U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of:	:	
	:	Date Issued: Feb. 1, 2001
DORA G. IVEY, on behalf of	:	
EARL IVEY (deceased),	:	
Claimant	:	
	:	Case No.: 1999-BLA-1302
v.	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Respondent	:	

Richard C. Rookard
For the Claimant

Solicitor
For the Respondent

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER - REJECTION OF CLAIM

Statement of the Case

This proceeding involves a request for modification of a prior denial of a first claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §§ 901 et seq. ("the Act"), and the regulations promulgated thereunder.[1] This is the claim of Earl Ivey, a deceased Miner,

[1]All applicable regulations which are cited are included in Title 20, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Director's Exhibits are denoted "D-"; Claimant's Exhibits are denoted "C-"; and citations to a hearing transcript are denoted by date and "Tr." The amended Departmental regulations issued on December 20, 2000, effective January 19, 2001, and affecting Parts 718 and 725, under which review of this claim has necessarily been conducted, do not significantly affect the analysis or outcomes of this Miner's claim, because those changes purport to be clarifications in conformity with existing law. Amended §725.310, governing requests for modification, is inapplicable in

now pursued on his behalf by his widow, Dora Ivey, the Claimant, who is represented in the proceeding by her son and lay representative, Richard C. Rookard.[2] The Director, OWCP, is Respondent, not an Employer, Responsible Operator, because the District Director ruled on December 31, 1998, that the operation of the Transfer Provisions of the 1982 Amendments to the Act apply to the Miner's claim and that, as a result, the Director is liable for any benefits that might be paid. (D-74) That ruling is not contested. Since this claim was filed in 1973, and has not been finally determined, it must be considered initially as a request for modification of a denial under Part 727 pursuant to §725.310.[3] Because the Miner was last employed in the coal industry in Tennessee, the law of the Sixth Circuit of the United States controls. (D-1, 2, 3) *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Procedural History[4]

The Miner's initial claim was filed while he was still working. It was initially denied by the Social Security Administration on August 17, 1973, again, effective May 16, 1974, and after review on March 23, 1976, on the grounds that neither pneumoconiosis nor total disability due to pneumoconiosis had been established. (D-17, subex. 2, 5, 7)[5] After this initial consideration by the Social Security Administration, the claim was referred to the U.S. Department of Labor (DOL) under the 1977 amendments to the Act, and again denied on August 14, 1981, because neither pneumoconiosis nor total disability had been established. (D-16, 17, 18) That denial was confirmed on January 27, 1984, and the claim was administratively closed on March 30, 1984. However, notwithstanding, it was, denied again on May 31, 1984, and referred for hearing to the Office of Administrative Law Judges. (D-20, 21, 22, 27)

The claim was submitted to Judge Thomas for decision on the record on October 1, 1987. (D-28) Without reaching the merits, Judge Thomas issued a Decision and Order of Dismissal on January 20, 1988, because the Miner had not pursued his claim in a timely manner after DOL's denial of January 27, 1984. (D-29) The Miner appealed. (D-30, 31) In a Decision and Order

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accordance with §725.2(c). Review under Part 727 is essentially unaffected. §725.4 In particular, since no evidence of record was developed after January 19, 2001, the amended quality standards for the administration of clinical tests and examinations are expressly inapplicable. §718.101(b).

[2]Dora Ivey, previously married to Maurice Rookard, was married to Earl Ivey on March 10, 1968. (Oct. 6, 1993, Tr. 4, 14)

[3]The District Director's Proposed Decision and Order dated November 3, 1998, indicates that the Miner's claim was filed on January 1, 1970. Claimant correctly asserts that a June 29, 1973, filing is definitively documented. (D-1, 136)

[4]References to regulations in the procedural history are to regulations as designated, effective, and applicable at the pertinent times.

[5]In the case of certain multipage exhibits, references to preexisting subordinate exhibit numbering are used for convenient reference only.

dated October 19, 1992, the Benefits Review Board vacated the dismissal and remanded for a *de novo* hearing with the option of reopening the record. (D-35)

In the meantime, the Miner had died on December 20, 1989. (D-36) His widow filed a separate survivor's claim on April 10, 1990, which has been administratively separated from the Miner's claim. (D-36) Under cover of a letter dated April 2, 1990, the Claimant submitted additional evidence in support of the Miner's claim with a request for reconsideration of the claim, as well as in support of her survivor's claim.[6] (D-60) On March 18, 1993, the Director moved to defer hearing of the Miner's claim until the Benefits Review Board had reviewed the widow's claim, which had been denied by Judge Thomas on July 20, 1992, and appealed, and to consolidate the two claims. The motion was opposed by the Claimant on the grounds that consolidation would subject the Miner's claim to more stringent regulations controlling the widow's survivor's claim; that consolidation would involve the responsible operator's attorneys in the Miner's claim, and would potentially deprive the parties claimant of certain unspecified due process, and would cause delay. But Claimant did not expressly object to consolidation of the evidence in the two cases.[7] (D-37, 38, 42) Judge Thomas denied the motion to stay the Miner's claim and to consolidate the cases while his denial of the survivor's claim was on appeal, noting that the Office of Administrative Law Judges did not have a procedure for holding cases in abeyance for indefinite periods pending Benefits Review Board Decisions. (C-5)

On August 28,1993, Claimant wrote Judge Thomas requesting reopening of the record to introduce new evidence consisting mostly of the entire case file for the widow's survivor's claim. Claimant wrote, "There is much evidence in the widow's case file [91-BLA-2680] such as autopsy report, reasoned medical opinions, etc., that is not present in the Earl Ivey case, per se, 85-BLA-3201. To create a sense of fairness and due process, we would like to present evidence in file 91-BLA-2680 as new evidence into the Earl Ivey case, 85-BLA-3201." (D-41;

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[6]Her letter referred to new medical evidence enclosed which the Miner had allegedly been prevented from submitting because of ill health and death. The letter also stated, "An autopsy report can be obtained from Pathologist Lynn F. Blake, M.D. or C.C. Sexton, M.D. of LaFollette Medical Center, LaFollette, TN 34766."

[7]The criteria for entitlement of the Miner's and survivor's claims are fundamentally different, and are set forth under entirely separate Parts of the regulations. Part 727 applies initially to the Miner's claim. If entitlement is not established under that part it is subject to review under Part 718. The entirely unrelated provisions of Part 718 which apply to survivor's claims are applicable to the Claimant's claim as a surviving widow, and have no application to the Miner's claim. Claimant's concern regarding the application of more stringent regulatory criteria against the Miner's claim if the claims were consolidated is misplaced. Moreover, counsel to the Employer, responsible operator in the Survivor's claim, suggested on April 15, 1993, that it was prohibited from participating in the Miner's claim by §934(b)(1)(B) of the Act. (D-40) For reasons given infra this tribunal has concluded that that rationale is not sound, although the Employer correctly asserts that it would have no role in relation to the Miner's claim. Because it is not a named respondent to the Miner's claim, the Employer would have no standing or direct involvement in the prosecution or defense of the Miner's claim. Thus Claimant's concern in this regard is also misplaced.

Oct. 6, 1993, Tr. 7) Following the remand of the Miner's claim, a hearing was conducted by Judge Thomas in Knoxville, Tennessee on October 6, 1993. The Claimant was represented by her lay representative, Richard C. Rookard; the Director was represented by the Solicitor of Labor. (D-43) At the hearing before Judge Thomas, the Claimant sought admission into evidence in the Miner's claim of "some of the [widow's] case file and materials [described as twenty selected and identified exhibits]." The motion was not opposed by the Director, provided that all of the medical evidence in the widow's claim be admitted consisting of Director's exhibits 5, 7, 9, 10, 11, 12, 13, 14, 15, and 29. The motion was granted without objection or reservation by the Claimant. (D-43 at 5-8)[8] Director's Exhibits 1-37 were admitted into evidence without objection. (Tr. 5)[9]

In his Decision and Order on Remand denying benefits on December 23, 1993, Judge Thomas found the Trust Fund liable for any benefits that might be paid because the Director, OWCP, did not designate a responsible operator. (D-44) He credited Claimant with fifteen years of qualifying coal mine employment. He then found the Claimant entitled to invoke the interim presumption pursuant to §§727.203(a)(1) and (4), but that the presumption was rebutted pursuant

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[8]Judge Thomas in his Decision and Order on Remand Denying Benefits dated December 23, 1993, stated that "[t]he record as finally comprised consists of Director's Exhibits 1-37 and the Claimant's Exhibits 1-20." (D-44 at 3) He also noted that the autopsy report itself had not been made a part of the record, and so did not rely upon it. (D-44 at 8) These identified exhibits all appear, some redundantly, in the record of the Miner's claim before this tribunal with various exhibit numbers. The autopsy protocol by Dr. Blake is now part of the record before this tribunal.

[9]While Judge Thomas's decision on remand was on appeal, by letter dated November 8, 1994, the Claimant urged the Benefits Review Board to review both the Miner's and survivor's claims in concert and to remand the cases separately. (D-95) The copious submissions of the Claimant suggest that one objective was to exclude the use of certain evidence originally adduced in relation to the survivor's claim from use with respect to the Miner's claim. As a matter of general principle, this objective is inappropriate and inconsistent with applicable regulations. Section 725.405 dealing with "Development of medical evidence; scheduling of medical examinations and tests," provides for appropriate medical examination and testing of living miners, and requires the deputy commissioner, now the district director, to "obtain whatever medical evidence is necessary and available for the development and evaluation of [a survivor's] claim, and provides with respect to miners' and survivors' claims, "(d) The deputy commissioner shall, where appropriate, collect other evidence to establish: (1) The nature and duration of the miner's employment; and (2) All other matters relevant to the determination of the claim." Since both the Miner's and the survivor's claims have been before the District Director, that official must be deemed to be fully aware of what evidence is available and would be derelict not to marshal and utilize all relevant, material, and credible evidence, favorable and unfavorable to any party, relative to the resolution of either or both claims. Therefore, this tribunal declines to exclude evidence solely because it was initially adduced by a party to the survivor's claim which is not presently before this tribunal. This specifically includes the existing evidence related to the autopsy of the Miner and evidence adduced by the Employer as party respondent in response thereto, including the two doctors' curricula vitae and the consultative opinion of Dr. Kleinerman.

to §727.203(b)(3). He found that the Miner had established the existence of pneumoconiosis arising out of coal mine employment pursuant to §§718.202(a)(1) and 718.203(b), but had not established total respiratory disability pursuant to §718.204(c), and denied benefits. On appeal Judge Thomas's findings regarding the responsible operator, and pursuant to §§727.203(a)(1), 727.203(b)(1), (2), and (4), 718.202(a)(1) and 718.203(b) were affirmed as unchallenged on appeal by the Benefits Review Board in an unpublished Decision and Order dated May 31, 1996. (D-114) Judge Thomas's invocation of the interim presumption pursuant to §727.202(a)(1) was based upon Dr. Naeye's opinion that the autopsy evidence established the existence of pneumoconiosis.

However, Judge Thomas's determination that rebuttal was established under §727.203(b)(3) was vacated and remanded by the Board for determination of whether the evidence rules out pneumoconiosis as the cause of the Miner's total respiratory disability in accordance with the law of the Sixth Circuit, citing *Sammons v. Wolf Creek Collieries*, 19 BLR 1-24 (1994); *Bates v. Creek Coal Co.*, 18 BLR 1-1 (1993); *see also Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). Judge Thomas's findings had been limited to proof that the miner's pneumoconiosis had played no part in causing his death. (D-91, 114)

The Board noted, as asserted by the Director, that Dr. Kleinerman's opinion ruling out pneumoconiosis as a cause of the Miner's death was entitled to little, if any, weight in the case arising in the Sixth Circuit under the rubric of *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), presumably because of the court's holding that a physician's opinion that conflicts with established proof that a miner has pneumoconiosis is without probative value. In addition, because Judge Thomas did not explain or reconcile his conflicting findings regarding the presence of a totally disabling respiratory or pulmonary impairment under §727.203(a)(4) and under §718.204(c)(4), the Board vacated the findings and remanded. The Board also advised that if rebuttal were established pursuant to §727.203(b)(3), it would sever the causal connection between total respiratory disability and pneumoconiosis, and avoid the need to consider entitlement under Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see also Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The Board refused to consider the Director's argument that Judge Thomas's findings pursuant to §§727.203(a)(1) and 718.202(a)(2) in the Miner's claim and findings pursuant to §718.202(a)(2) in the survivor's claim were inconsistent, because the survivor's claim was not then before the Board. (D-114) On remand the Miner's claim was reassigned to Judge Kichuk because Judge Thomas was unavailable. (D-117)

In his Decision and Order on Remand - Denying Benefits dated June 18, 1997, Judge Kichuk considered whether the Miner's proof of the existence of pneumoconiosis by autopsy and invocation of the interim presumption of total disability due to pneumoconiosis at the time of his death, and the presumption that his death was due to pneumoconiosis arising out of his fifteen years of coal mine employment pursuant to §727.203(a)(1), were rebutted pursuant to §727.203(b)(3). Judge Kichuk invoked the interim presumption pursuant to §727.203(a)(3) on the basis of qualifying arterial blood gas studies, but not on the basis of pulmonary function

studies under §727.203(a)(2).[10] Judge Kichuk concluded on the basis of physicians' opinions, death certificate, autopsy report, and other evidence that coal workers' pneumoconiosis was not the cause of the miner's respiratory and pulmonary impairment, and that neither the total disability nor the death of the Miner was caused in whole or in part by his coal mine employment. Thus, he concluded that rebuttal of the interim presumption was established by a preponderance of the evidence pursuant to §727.203(b)(3). (D-123)

By unpublished decision and order dated June 18, 1998, the Benefits Review Board vacated Judge Kichuk's Decision and Order on Remand, and remanded the case to the District Director to consider the Claimant's request for modification pursuant to §725.310. In requesting modification Claimant had submitted new evidence consisting of seven allegedly qualifying blood gas studies and had requested a hearing while the claim was before Judge Kichuk on remand. The Board held that Judge Kichuk had erroneously considered the evidence and rejected the claim on the merits without a hearing; that what was deemed to be a request for modification should have been transferred to and initiated before the District Director; and that the Claimant was entitled to a hearing as a matter of right to procedural due process. *See Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998). Although the Director urged that Judge Kichuk's finding of pneumoconiosis, like Judge Thomas's, was a mistake of fact, the Board did not address the Director's assertion "that the issue of invocation of the interim presumption should also be reviewed on modification." The Board declined to address the merits of the appeal because the request for modification was pending.

The request for modification was denied by the District Director on November 13, 1998, and, following Claimant's request for a formal hearing, both the Miner's claim and the survivor's claim were transmitted to the Office of Administrative Law Judges on December 31, 1998. (D-136, 137, 138) Following a notice of hearing, Claimant moved to separate the two cases and to continue the survivor's claim. Following an order to show cause, Judge Wood canceled the scheduled hearing by order dated August 6, 1999, and remanded the Miner's and the survivor's claims to the District Director for administrative separation, with each claim to include the evidence then of record, and for retransmittal to the Office of Administrative Law Judges as two separate claims.[11] (D-141, 142, 143, 144, 149) The District Director separated the claims and

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[10]Judge Kichuk admitted into evidence nine of the twelve arterial blood gas studies in the record before him which had been submitted with the request on behalf of the Miner to reopen the record. (D-123) All of the studies that were before Judge Kichuk are before this tribunal. (D-9, 10, 11, 56; C-31, 32, 33)

[11]Claimant sought separation of the Miner's claim from the survivor's claim in order to bar the allegedly prejudicial use in the Miner's claim of certain evidence developed in the survivor's claim. Claimant contends that, because no responsible operator is designated as the Respondent in the Miner's claim, the Director, OWCP, is the sole Respondent to the Miner's claim, and that the Respondent to the widow's claim, the Employer, James Spur, Inc., is not a party to the Miner's claim, and should be insulated accordingly. Claimant expressly objects to the Director's or this tribunal's "using any evidentiary material in this miner's case 85-BLA-3201 that was generated by attorneys for James Spur Coal Co. or its insurance carrier Old Republic Insurance Co. relevant only to the widow's separate filing of case 91-BLA-2680."

returned the cases, separately, to the Office of Administrative Law Judges on September 3, 1999. (D-137)

After the District Director returned the cases to the Office of Administrative Law Judges, and after a notice of hearing, Claimant's unopposed request for waiver of oral hearing of the Miner's claim was granted by order dated April 14, 2000. The Miner's claim is, therefore, ready for decision on the written record.[12] The proceedings before this tribunal are *de novo.* No findings by the District Director, and, indeed, no prior findings are binding upon this tribunal if they reflect a mistake in a determination of fact. The widow's survivor's claim is not part of the Miner's claim, and, as such, is no longer before this tribunal.

The Miner's claim is decided first at Claimant's request; the survivor's claim has been continued.[13] Pursuant to the April 14, 2000, order the evidentiary record was closed as of April 21, 2000, since there was no request by a party to supplement the evidentiary record. The deadline for briefs was May 26, 2000. Claimant has filed extensive argument.[14] The Director has not filed closing argument. On December 27, 1999, Claimant had filed a binder of forty-one numbered Exhibits, along with copious arguments and admonitions. The forty-one items

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These cases have been redocketed and redesignated on remand before the Office of Administrative Law Judges as 1999-BLA-1302 and 1999-BLA-1303, respectively. Claimant specifically objects by letter dated December 17, 1999, to the use of Dr. Kleinerman's report reviewing the autopsy evidence, because it was allegedly obtained by the respondent Employer in connection with its defense in the survivor's claim at a time when no responsible operator was assigned to the Miner's claim. Claimant contends that it was improperly included by the District Director in the case file pertinent to the Miner's claim. (D-73, 80, 109) Claimant demands that that report, together with the doctor's curriculum vitae, as well as the curriculum vitae of Dr. Blake, the prosector, be removed from the file pertaining to the Miner's claim, all for the same reason.

[12]The Sixth Circuit's requirement of a written waiver of the right to a hearing and request for a decision on the record has been satisfied. *See Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425 (6th Cir. 1998).

[13]Consolidation of cases involving similar issues, particularly a widow's claim and a deceased miner's claim, is normally permitted by applicable regulations. §725.460; 29 CFR §18.11 However, Claimant correctly avers that if the Miner's claim under Part 727 were decided favorably with an award of benefits, the widow's separate and subsequent survivor's claim pursuant to Part 718 would be moot.

[14]Many representations by Claimant's lay representative in presenting the Miner's case must be recognized as argument and are not evidence. The status of those representations made by affidavit of the Claimant's lay representative need not be resolved for reasons given elsewhere. The Miner also relies repeatedly upon the principle that doubt is to be resolved in favor of the Claimant. However, while giving due deference to this principle, this tribunal is bound by the holding of the Supreme Court in *Director, OWCP, v. Greenwich Collieries, 512 U.S. 267 (1994),* that at all times the Claimant bears the burden of proof of each of the elements of entitlement to black lung benefits.

submitted by Claimant to the District Director, when modification proceedings were initiated pursuant to §725.310, were in a loose leaf binder and have been admitted into evidence without objection. (D-136) They have been carefully considered by this tribunal. The Director's file transmitted by the District Director to the Office of Administrative Law Judges on September 3, 1999, consists of three thick files containing 150 exhibits, many of them including duplicate material and arguments previously submitted at various times by the Claimant.[15] The file includes evidence developed subsequent to the Miner's death, some of it, initially, in relation to the widow's survivor's claim. As noted, Claimant has lodged specific objections to certain items and certain materials within this body of materials. Appropriate rulings are made herein with respect to Claimant's objections to the Director's exhibits and pertinent to other matters, as well as other requests for relief as necessary to a proper determination of the claim.[16]

Issues[17]

i. Whether the Miner had pneumoconiosis as defined by the Act and regulations?

ii. Whether the Miner's pneumoconiosis arose out of coal mine employment?

iii. Whether the Miner was totally disabled?

iv. Whether the Miner's disability or death was due to pneumoconiosis?

v. How much coal mine employment is properly credited to the Miner?

vi. Whether the evidence establishes a change in conditions or a mistake in a determination of any fact pursuant to §725.310?[18]

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[15]The 150th Director's exhibit in the file transmitted by the District Director to the Office of Administrative Law Judges is misidentified and misdescribed as Director's Exh. No. 137, a Form 1025 controversion sheet dated September 3, 1999, reflecting the Director's recorded preservation of contraverted issues, and consisting of four pages. In fact, the exhibit consists of twelve pages, including, in addition to the controversion sheet and list of parties, an eight page List of Director's Exhibits, and the District Director's claim referral letter also dated September 3, 1999. Because the remand for separation of the two cases required of the District Director only a ministerial act, the subsequent rereferral of the file should have entailed no change in the controversion of issues pertinent to the prior referral, and there is no indication that it did.

[16]Proceedings conducted by the District Director need not be conducted by the District Director personally, but may be and are properly delegated to Claims Examiners under well established practice. Claimant's objection in this regard is overruled.

[17]Except for rebuttal, the issues are identified in the controversion sheet, CM-1025, transmitted to the Office of Administrative Law Judges denoted Director's Exhibit 137 for resolution by this tribunal. Because this is a request for modification, scrutiny by this tribunal of all prior factual determinations of record is mandated. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

vii. Whether the interim presumption pursuant to §727.203(a) may properly be invoked?

viii. Whether the interim presumption, if properly invoked, has been rebutted pursuant to §727.203(b)?

ix. Whether, if entitlement has not been established under Part 727, it has been established under Part 718?

Findings of Fact

Background and Coal Mine Employment

The Miner was born on December 22, 1916, and was seventy-seven years old at the time of his October 6, 1993, hearing before Judge Thomas. (D-44) He was married to Dora Gracie Ivey on March 10, 1968. She was married to, living with, and dependent upon the Miner until his death on December 20, 1989. (D-1, 36, 45)

Claimant alleges fifteen years of coal mine employment. (D-3) Twelve years is not contested by the Director on the applicable controversion sheet. (D-137) Fifteen years of coal mine employment has been previously found by Judge Thomas and affirmed by the Benefits Review Board. (D-44, 91, 114; C-13, 41) However, Judge Thomas merely listed sources in the recorded, but did not discuss or disclose any analytical basis for his finding. (D-91)[19]

In his original application filed in 1973, the Miner listed work for James Spur Coal Co. from August 1972, continuing at the time of the application; Thatcher Coal Co. from June 1970

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[18]Because there has never been a denial of the Miner's claim which has not been appealed and thus become final, scrutiny of the record for a mistake in a determination of fact which might have occurred at any time since the claim was filed is appropriate. Mistakes in determinations of fact have been the unresolved bases for prior remands by the Benefits Review Board. Since the Miner has been deceased for more than ten years, there would have been no change in his condition or "change in conditions" under the regulation. Thus, Claimant's request for modification, in effect, mandates a review of th entire record, *de novo*, on the merits of the Miner's claim.

[19]Amended §718.301 requires that, where invocation of presumptions depend upon proof of a specified amount of coal mine work, proof of the length of the miner's coal mine history must be computed as provided by §725.101(a)(32). The evidence of record is manifestly deficient in quality and extent to allow the calculations specified by that section. Consequently, there is a failure of proof with regard to the fifteen or more years of coal mine employment required for invocation of the presumption under §718.305 sought by Claimant. A similar deficiency of proof would relate to any attempt to invoke the presumption under §718.302, and §718.303, which, however, Claimant has not made. The requirements of amended §718.301 do not by their terms extend to invocation of presumptions under Part 727.

to August 1972; Howard Ensley Coal Co. from April to June, 1970; Davis Constr. Co. under contract with Blue Diamond Coal Co. from May to October, 1959, all as a motor grader operator; Walter Leach Trucking Co., driving a truck "for Mr. Leach from G & R Coal Co." from May 1958 to May 1959; and A. H. Ivey Coal Co., the Miner's father's company, as a coal loader from 1932 to 1938. Since he was born on December 22, 1916, the Miner would have been age sixteen to twenty-two when he did that work for his father. (D-1, 4, subex. 9) An affidavit by Walter Leach indicates only that Claimant drove a truck hauling coal, but provides no details regarding the origins, destinations, or processed state of the coal, or terms and conditions of employment, such as workweek. (D-3, subex. 9) The Miner's affidavit claiming fifteen years refers to records generally, but provides no particulars to support the claim. (D-3) The Miner's Description of Coal Mine Work dated December 8, 1979, claimed the job title of Tipple Operator from 1970 to present, operating the tipple control panel, spotting cars, and picking rock off the belt line. (D-4)

In the opinion of Judge Howes, the Social Security Administration's Administrative Law Judge, which was issued November 19, 1975, with findings pertaining to the period prior to July 1, 1973, the judge noted, based on the testimony of the Miner, that the Miner had completed high school, and had worked as a coal miner with his father from 1934 until 1938; that he drove a truck hauling coal for fifteen to eighteen months in 1958-59, and went to work as a strip miner in 1970 for two months, and then operated a motor grader, building road to and from the strip mine locations. At the pertinent times, the judge noted, the Miner was still working at road grading to and from strip mines, and occasionally came into contact with coal dust "about a day once in a while" when he was asked to clean coal. The judge found less than a year of coal mine employment had been established. (D-17) Also, in his report dated December 3, 1974, Dr. Fox recorded a work history from the Miner of eleven years, with approximately six years underground loading coal, and the rest doing tipple work and strip mining, currently. (D-10)

In his report dated February 27, 1974, Dr. Swann recorded that the fifty-seven year old former underground coal miner had worked in and around coal mines for twelve years, three to five years underground. In his report dated December 3, 1974, Dr. Fox recorded a work history from Claimant of eleven years, with approximately six years underground loading coal, and the rest doing tipple work and strip mining, which was continuing. (D-10) Drs. Pearson, Walker, and Smith did not record employment histories.

A Social Security earnings statement does not reflect some of this early employment. However, it shows eighteen quarters of coal mine employment, ten in 1970-72 for Howard Ensley Coal Co.; eight in 1973-74 for James Spur Coals, Inc., both in Tennessee. ((D-2, subex. 8) A subsequent, somewhat inconsistent, but presumably more reliable Social Security earnings statement reflects ten quarters for Thacker Coals, Inc. in 1970-72; one quarter for Howard Ensley Coal Co., Inc. in 1970; thirteen quarters for James Spur Coals, Inc. in 1972-75; and twenty four quarters for James Spur Coals, Inc. in 1975-82, for a total of forty-eight quarters, or twelve years of coal mine employment. (D-47)

A separate statement from James Spur Coals, Inc. indicates that the Miner had worked from June 1, 1970 at least through December 19, 1979, the date of the statement when the Miner was still working as tipple man, car dropper, and grader man. (D-4) The Miner's Description of Coal Mine Work dated December 8, 1979, claimed the title of Tipple Operator from 1970 to

present, and listed duties of operating the tipple control panel, spotting cars, and picking rock off the belt line. (D-7) W-2 forms indicate that he worked most if not all of 1979 and 1980, and correspondence confirms his work for that company and his retirement July 23, 1982. (D-5) Correspondence from the Comptroller of James Spur, Inc. states that he could not provide information concerning the Miner's work for James Spur Coal Co., Inc., which it had purchased, but that the Miner had worked for James Spur, Inc. from July 1, 1980, until July 24, 1982, as a grader operator. (D-48) There is no testimony of the Miner in the record, though Social Security Judge Howes refers briefly to testimony by the Miner related to his employment in the judge's decision dated November 19, 1975. (D-17)

The evidence pertaining to the Miner's coal mine work is confusing, inconsistent, and limited at best, and it is apparent that the Miner himself was not a reliable historian. Judge Howes findings based on the Miner's testimony that he had begun work in the mines in 1934, not 1932 as alleged by the Miner, and that the Miner completed high school, which he would have done in the normal course in 1934, it appears that the Miner at least combined necessarily part time work from 1932 to 1934 with presumably full time work from 1934 to 1938, though there is no evidence whatever of extent or frequency of that latter work. It also appears that a substantial portion of the miner's work involved operation of a motor grader. Strangely, the Miner did not mention this in his Description of Coal Mine Work in 1979. It is notable too that James Spur, Inc. reported that the Miner had worked as a grader operator the last two years before his retirement.

Judge Howes provided the only description of that work in the period prior to 1973, based on the Miner's testimony, and because exposure to coal dust appears to have been rare, and that construction work would appear to have been off the actual mine site, and not to have been a function integral to the extraction or processing of coal except in an extremely attenuated sense, it has not been shown to qualify as coal mine work. Extrapolated into later years, that evidence would bring into question the qualifying character of an unspecified portion of the Miner's later grader work, about which the record discloses nothing as to character, extent, or proximity to the mine. Indeed, it is not disclosed whether any mine in relation to which the Miner apparently did the grader work was in operation or operable, or that he was actually exposed to coal mine dust when he did such work. *See Conley v. Roberts & Schaefer Co.*, 7 BLR 1-309 (1984); *cf. William Brothers, Inc. v. Pate*, 833 F.2d 261, 10 BLR 2-333 (11th Cir. 1987).

Since the locales and routes of his truck hauls are not disclosed, it cannot be determined whether that work would have qualified as coal mine employment. The frequency and extent of the Miner's tipple work is also wholly undefined on this record, though such work indisputably would qualify as coal mine work. The Miner's status as a miner under the Act is also not in question. However, because qualifying coal mine employment of at least twelve years, presumably based upon a generous interpretation of the Social Security Administration Statement of Earnings which this tribunal is willing to adopt, is not contested by the Director, because the Claimant carries the burden of proof, and because the representations attributable to the Miner are not credible generally as to accuracy of detail, this tribunal finds that the Miner may be reasonably credited under Part 727 with twelve years of coal mine employment, but not more, ending in July 1982. (D-137)

X-ray Evidence[20]

Exh.	Date of x-ray	Doctor	Quali-. fication	Qual-ity	Interpretation
D-10	1974	Fox			Bilat. hilar parenchymal opacities, 2mm. & fibro calcification
D-14	7/11/72	Pryse			Non-TB chest condition
D-13, D-8	7/16/73	Dukes	BCR	Sat.	0/0
D-9; C-16	2/14/74	Swann		Sat.	0/1 p
D-15	10/6/81	Pongdee			no acute infiltration or congestive changes. No acute or active disease.
D-12; D-52	10/6/81 2/20/89	Sargent Prater	B/BCR BCR[21]	2	0/1 s,t negative
D-58	2/20/89	Gordonson	B/BCR		unreadable
D-56	10/21/89	Cohen	BCR		COPD
D-56	10/24/89	Cohen	BCR		COPD
D-56	11/06/89	Cohen	BCR		COPD
D-59	12/20/89	Gordonson	B/BCR	2	negative

An x-ray taken 10/27/89 relating to an upper gastrointestinal examination does not refer to the lungs and is nonprobative. (D-56) There is no conforming positive x-ray evidence of coal workers' pneumoconiosis. An ILO-U/C classification of 0/1 is not evidence of pneumoconiosis under the governing regulations. §727.428(a)(1)(iii)

Autopsy Evidence

An autopsy was performed by Dr. Blake on December 21, 1989, the day after the Miner's death on December 20, 1989.[22] His protocol is dated March 29, 1990. (D-53, 55) The autopsy

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[20]Claimant's evidentiary exhibits which were introduced and received in evidence at the hearing before Judge Thomas on October 6, 1993, are contained in Director's Exhibit 42. Although Claimant refers to Claimants' Exhibits by number in "Claimant's Presentation," which is included near the beginning Exhibit 42, the exhibits are not clearly identified as such by number within this compilation. There is no apparent disparity in number or description of the x-ray exhibits.

[21]The record does not contain the credentials of Dr. William K. Prater. However, this tribunal takes judicial notice of Dr. Prater's qualifications as a board-certified diagnostic radiologist as listed in *The* Official *ABMS* [American Board of Medical Specialties] *Directory of Board Certified Medical Specialists* (27th Ed.)(1995). *See Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). Pertinent qualifications of Drs. John Pryse, and O. Pongdee were not established and are not of record, although an inventory of exhibits indicates that the professional qualifications of Drs. Pryse, James B. Dukes, William K. Swann, and Joseph C. Fox were submitted with their medical reports. (D-51)

protocol conforms to the requirements of §727.428(3)(c). The gross autopsy examination of the lungs reflected large clots in the pulmonary arteries extending into the lobar arteries and segmental arteries within both lungs. The lungs showed mild to moderate pulmonary edema and mild to focally moderate emphysema, and no significant fibrosis. The microscopic examination disclosed some sections of lung showing mild to focally moderate emphysema, but no significant interstitial fibrosis. A few pulmonary medium to small arteries showed prominent mural thickening, and patchy areas throughout the lungs showed congestion and focal pulmonary edema. Occasional small pulmonary parenchymal nodules showed fibrosis with aggregates of anthracotic ladden [sic] histiocytes, which nodular foci measured less than 2 mm. in diameter. Various large pulmonary vessels contained portions of clots of various ages. The pertinent final pathological diagnoses included:

i. Pulmonary emboli, multiple, bilateral, large and small, both recent and old, obstructing the main pulmonary arteries and main lobar arteries to both lungs.
ii. Pulmonary congestion and edema, mild to moderate.
iii. Pulmonary emphysema, mild to focally moderate, primarily of upper lobes.

Dr. Blake opined that the immediate cause of death was respiratory arrest due to pulmonary embolization, both recent and old. The terminal event was most likely an acute cardiac arrhythmia brought about by myocardial hypoxia resulting from recent pulmonary embolization superimposed on the presence of remote pulmonary emboli within major pulmonary vessels. He assessed significant relatively recent deterioration in this regard. He also opined that several very small fibroanthracotic nodules were present throughout the parenchyma of the lungs indicating possible previous coal dust exposure. He declared that these nodules were all 2 mm. or less in size and insufficient for diagnosis of anthracosilicosis of any degree. The attached provisional pathologic diagnosis was essentially the same, but included a relevant comment indicating that from gross autopsy examination, the immediate cause of death was felt to be bilateral pulmonary embolization of recent origin, with no myocardial infarctions identified, and a note that the provisional pathologic diagnoses were telephoned to Dr. Isham to be relayed to Drs. Giles and Sexton on 12/26/89, two working days after the autopsy. No affirmative diagnosis of clinical, or finding of legal, coal workers' pneumoconiosis is disclosed in the autopsy protocol. Dr. Blake did not directly assess the extent of pulmonary impairment or the extent of disability attributable to these conditions prior to the Miner's death.

A consultative report dated September 10, 1990, was obtained from Dr. Naeye at the behest of the Department of Labor. (D-42, 57; C-22) Dr. Naeye is board-certified in anatomic and clinical pathology. (D-57; C-46) His report reflects review of the autopsy report, twenty-seven glass slides with tissue removed at autopsy, thirteen containing lung tissue, and twenty-

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[22]This tribunal takes judicial notice of Dr. Lynn French Blake's qualifications as a board-certified anatomic and clinical pathology as listed in *The* Official *ABMS* [American Board of Medical Specialties] *Directory of Board Certified Medical Specialists* (27th Ed.)(1995). *See Maddaleni*. These qualifications appear in Dr. Blake's curriculum vitae. (D-80) Claimant has objected to the use of this curriculum vitae as improperly derived from evidence adduced by the Employer respondent in the widow's survivor's claim. However, it is relevant and material evidence with no proof that it was not lawfully obtained by the District Director, and so that objection is overruled.

seven tissue blocks. (D-57) Dr. Naeye noted that the absence of a complete description of the heart in his copy of the autopsy report prevented an assessment of whether there was cor pulmonale. He noted the absence of microscopic evidence of chronic bronchitis and chronic bronchiolitis. He did not explicitly assess the disabling effect, if any, of either the moderately severe to severe centrilobular emphysema or the many pulmonary arterial emboli of varying age and degrees of organization which he observed. Dr. Naeye opined on the basis of detailed findings that the Miner had "a very mild, simple coal worker's pneumoconiosis...characterized by the presence of some small anthracotic deposits with a small amount of fibrous tissue but no tiny birefringent crystals." He opined, "This pneumoconiosis is far too mild to have prevented [the Miner] from doing any kind of work, including hard physical work, in the coal mining industry. It is also far too mild to have contributed in any way to his death. Death was due to recurrent pulmonary arterial emboli, a non-occupational disorder. The centrilobular emphysema that is present cannot be attributed to occupational exposure to coal or to coal mine dust because the ALFORD scientists have shown that US coal miners, including those with simple coal workers' pneumoconiosis, have no more pulmonary emphysema than non-miners [citations omitted]."

Dr. Kleinerman's April 8, 1991, review of occupational history, specified medical records, and histological slides with respect to the Miner's claim is reflected in a report dated April 8, 1991.[23] Dr. Kleinerman is board-certified in Pathologic Anatomy and Clinical Pathology. (D-109) His review included the reports of Drs. Fox, Pearson, Long, and Walker, and certain hospital records. It did not reflect review of Dr. Naeye's report. His review of the histological slides disclosed recent and organizing pulmonary thromboemboli in the Miner's various sized pulmonary arteries, but no definitive lesions of simple or complicated coal workers pneumoconiosis, simple nodular silicosis, or conglomerate silicosis. He observed small amounts of black granular pigment in various lung locations, minimal subpleural airspace enlargement with fibrosis not associated with the black granular pigment or related to coal mine dust deposition. He opined that death was caused by bilateral recent massive and recurrent thromboemboli. He opined categorically that the lung sections showed no evidence of simple or complicated coal workers' pneumoconiosis, simple nodular silicosis or conglomerate silicosis, so

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[23]Claimant objects to the admission into evidence or consideration of Dr. Kleinerman's report and curriculum vitae. Dr. Kleinerman's report dated April 8, 1991, was submitted to the deputy commissioner by the Carrier, Old Republic Insurance Company and its insured, James Spur, Inc. by letter dated April 11, 1991. (D-73) These entities are parties respondent to the survivor's claim, but are not now parties to the case at bar. The curriculum vitae of Dr. Blake, to which Claimant also objects, was submitted to Judge Thomas by the Carrier and Employer with respect to the survivor's claim by letter dated February 26, 1992. (D-80) These documents were lodged, but not admitted into evidence, at a truncated scheduled proceeding before Judge Thomas on April 10, 1992, at which neither Claimant nor a representative appeared. (D-81) Subsequently, they have become part of the file developed by the District Director which was transmitted to this tribunal pursuant to §725.421. This tribunal take judicil notice of Dr. Kleinerman's qualifications as a board-certified anatomic and clinical pathology as listed in *The* Official *ABMS* [American Board of Medical Specialties] *Directory of Board Certified Medical Specialists* (27th Ed.)(1995). *See Maddaleni*. Claimant's objections to the admissibility and consideration of these exhibits are overruled, *supra* and *infra*.

that such diseases did not contribute to the Miner's death. (D-73) He did not explicitly assess the Miner's pulmonary impairment or disability prior to death.

Pulmonary Function Studies

Exh.	Date	Doctor	Ht/Age	Conform	FVC	FEV1	MVV
D-10	1956	Fox		No	below normal	2.8	
D-9	2/14/74	Swann		No	normal	83% of TVC[24]	82
D-11	10/6/81	Smith	72"/65	No	3.92	1.68	140[25]

The ventilatory studies by Dr. Smith were invalidated by Dr. Kraman, who is board-certified in internal medicine and pulmonary medicine, on January 23, 1984, for an insufficient number of tracings and less than optimal effort, cooperation, and comprehension. (D-11) Dr. Swann's and Dr. Fox's studies are nonconforming, and include no tracings of record. (D-9) None of these studies can be deemed to be qualifying pursuant to §727.203(a)(2).

Arterial Blood Gas Studies

Exh.	Date	Doctor	Conform	pO2	pCO2	Qualify
D-11	12/17/81	Smith	Yes	80	38	No
C-30, D-56	10/21/89	Giles		61	39	Yes
C-31	10/24/89	Giles/Burrell		70	35	No
	10/26/89	Giles/Burrell		61	39	Yes
D-56	11/05/89	Giles		66	39	No
C-32	12/11/89	Giles/Sexton		59	36	Yes
	12/11/89	Giles/Sexton		87	37	No
	12/15/89	Giles/Sexton		59	45	Yes
	12/17/89	Giles/Sexton		64	40	No
C-33	12/20/89	Giles/Burrell		57	37	Yes
	12/20/89	Giles/Burrell		14	60	Yes
	12/20/89	Giles/Burrell		5	66	Yes

By letters dated April 30, 1990, the Claims Examiner Hart addressed Drs. Sexton, Burrell, Jackson, Allen, Giles, Farris & Cohen at the Records Dept., LaFollette Medical Center, in LaFollette, Tennessee, with a request to produce "[a]ny existing medical records resulting from treatment the miner has received for his lung condition" as evidence relevant to the claim, including specifically "1. Copies of any available medical records pertaining to the miner's cardio-pulmonary status including the results of any pulmonary function studies (including

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[24]Total Vital Capacity

[25]This solo MVV entry, unlike the other values and apparently in error, appears, in the predicted, rather than the observed column of the chart.

tracings) or arterial blood gas studies performed....2. Any available [original] chest x-ray films." (D-55; C-29, 34) The response by the facility was apparently incomplete, because Claimant asserts without contradiction that seven qualifying blood gas studies of the Miner, previously unknown, were obtained by Claimant from that facility many years later. Claimant's request for modification was based in significant part upon those allegedly qualifying blood gas studies. (D-56; C-30, 31, 32, 33)[26] Claimant alleges that the existence of nine recorded blood gas studies included in C-31, 32, and 33, was not discovered until shortly before Claimant submitted them with a request to Judge Kichuk to reopen the record. Judge Kichuk admitted them without elaboration by order dated May 15, 1997. (D-120, 123) Of the twelve arterial blood gas tests of record, the recorded values of seven, or a majority, are qualifying values according to the schedule under §727.203(a)(3) as Claimant alleges.

This evidence includes three last blood gas studies taken at 8:10 a.m., 1:10 p.m. and 1:25 p.m. on December 20, 1989, the Miner's date of death. (C-33) Claimant asserts that the clinical summary, apparently attributed to Dr. Sexton, refers to the last two blood gas studies when the Miner "experienced respiratory arrest. Extensive cardiopulmonary resuscitation was instituted. In spite of this his; oxygen fell from 16% to 5% prior to this effort being terminated. At this point the patient's pupils were dilated and fixed, and there were no neurological responses." The clinical summary records that the Miner had been admitted to the LaFollette Medical Center via the Emergency Room on the morning of December 20, 1989, evidently before 8:05 a.m., when the first blood gas study was taken, after the Miner had "fallen out at home." (C-34)

Dr. Giles is identified as the Medical Director, Respiratory Care Department, at LaFollette Medical Center where the tests were performed. His name appears in the letterhead of certain medical records including the blood gas studies, but there is no direct evidence that he conducted the studies, or directly supervised or interpreted them. (C-30, 31, 32, 33) The charts reflecting the studies of October 24 and 26, 1989, and December 20, 1989, indicate that Dr. Burrell was involved in an undisclosed capacity. (C-31, 33) The chart reflecting the studies of December 11, 15, and 17, 1989, indicate a similar involvement by Dr. Sexton.[27] (C-32) The last five blood gas studies, four of which produced qualifying values, were obviously taken within a week prior to the Miner's death. (C-32, 33) There is no apparent indication on the charts as to how the tests were administered, the applicable altitude and barometric pressure, or the status of

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[26]It can be inferred from the contents of D-56, and its proximity in the file to the request, that the response to the request, in addition to Dr. Blake's autopsy report included in D-55, consisted of Dr. Cohen's x-ray report dated 10/23/89 of a 10/21/89 chest x-ray; Dr. Allen's clinical notes dated 10/21/89; a blood gas study dated 10/21/89; Dr. Cohen's x-ray report dated 10/25/89 of a 10/24/89 chest x-ray; Dr. Cohen's report of 10/27/89 of an upper gastrointestinal series of even date; Dr. Allen's clinical notes dated 11/5/89, an EKG, and blood gas studies of even date; Dr. Jackson's clinical notes undated; Dr. Cohen's chest x-ray report of 11/6/89; and an undated EKG, presumably contemporaneous. (D-56)

[27]Claimant contends that certain blood gas studies which the Claims Examiner did not summarize were improperly disregarded because the Claims Examiner improperly or erroneously determined that they were not indicative of the Miner's usual state of health. (D-136) Those studies have been considered as appropriate by this tribunal.

equipment calibration, and there is only limited identifying information related to the Miner, administering technicians, and supervising physician. Thus, the records of the tests do not conform to the applicable quality standards specified in §718.105.

Other Evidence; Physicians' Medical Opinions[28]

Based on an examination and evaluation on November 22, 1974, recorded in a report dated December 3, 1974, Dr. Fox, who is shown not to be board-certified in any specialty or to be a qualified x-ray reader, indicated that he had previously seen the Miner as a patient, had diagnosed chronic obstructive pulmonary disease and probable coal miner's pneumoconiosis, and had treated the Miner with bronchodilator expectorant compound and a broad spectrum antibiotic. (D-8, subex. 17) No date was disclosed for the prior encounter. At the examination in 1974 Dr. Fox took appropriate histories, including coal mine experience of eleven years, six underground loading coal, and the rest at tipple work and strip mining work, and an undefined smoking history ending in 1956. He took a chest x-ray, and performed apparently truncated, nonconforming ventilatory tests. He noted a medical history, including exertional dyspnea, paroxysmal nocturnal dyspnea and two large pillow orthopnea, plus impaired mobility on hills and stairs and level ground if rushed. A physical examination disclosed loud moist rales throughout both lung fields, expiratory wheezes on rapid forced respiration. The chest x-ray showed some hilar and parenchymal opacities bilaterally which were rounded calcifications up to 2 mm. in size, more prominent in the hilar region, and some fibro-calcific formation in the lower portions of the lungs. As a result of the ventilatory tests Dr. Fox noted that the Miner's Vital Capacity tested 60% of normal with 2.8 liters. Dr. Fox's stated impression was of "1. Chronic Obstructive Pulmonary Disease on the basis of: 2. Coal Miner's Pneumoconiosis." (D-10, 51; C-10) He did not explain the relationship between the objective evidence and factors to which he referred and his diagnosis of pneumoconiosis. Nor is the relationship otherwise obvious from his report. Significantly, the Miner was working, and continued his usual work as a coal miner for several years after Dr. Fox's examination and assessment.

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[28]Medical records and assessments that do not bear on the Miner's respiratory or pulmonary condition are deemed immaterial and are not discussed. The Miner declined a medical examination offered by DOL, explaining on February 23, 1980, "I do not feel that I am able to undergo a breathing test and I do not feel Dr. Sargeant would give me a fair examination." (D-8) The several affidavits of the Claimant's lay representative are considered, but are given little weight because of the lay representative's obviously interested relationship to the Miner and his widow, who is the lay representative's mother, and because such general lay evidence does not have the probative value of reasoned and objective medial tests, reports, and opinions with respect to a black lung claim. (D-70) Because of the lay representative's status; because it does not require expert opinion testimony to prove that conditions around tipples and haul roads are likely to be coal dusty; because there is no dispute that the Miner was exposed to some amount of coal dust; because the history of Claimant's coal mine employment and any related exposure to coal dust is imprecise; and because medical evidence is the essential proof of the existence of pneumoconiosis and total disability attributable thereto, this tribunal need not rule on the qualifications of the Claimant's representative as an expert witness on any of these matters. (D-100)

Dr. Swann, an A-reader and thoracic surgeon and A-reader without specialty board-certification engaged in direct patient care, took medical, occupational, and smoking histories and performed a physical examination on February 14, 1974, including taking an x-ray and performing pulmonary function studies, on November 22, 1974, which were unrevealing. Dr. Swann's equivocal impression was possible coal workers' pneumoconiosis. (D-8, 9, subex. 15; C-16)

Dr. Smith's very brief assessment dated December 18, 1981, disclosed a limited pulmonary function test and a blood gas test. However, Dr. Smith's opinion that the Miner had chronic bronchitis and moderately disabling chronic obstructive pulmonary disease, based on abnormal pulmonary function studies, and arterial blood gas studies, which were not qualifying under the applicable regulations, disclosed no reasons for his conclusions. (D-11) There was no reference to coal workers' pneumoconiosis or coal dust exposure.

Emergency room treatments on November 5 and December 6, 1989, for treatment of acute bronchitis were not recorded as related to pneumoconiosis. The x-rays were noted to reflect no significant changes from 10/24/89.

Dr. Walker's brief letter report dated May 31, 1990, and chart indicated that the Miner had visited the Elk Valley Health Clinic intermittently from October 14, 1988, through October 6, 1989, for treatment of acute bronchitis, had been treated for acute bronchitis on two occasions in October 1989, and had an EKG for irregular heart beat on October 6, 1989.[29] But Dr. Walker did not relate the disease, symptoms, or treatment to coal mine dust exposure. (D-53)

The death certificate signed by Dr. Sexton on January 19, 1990, attributed the cause of death to "Bilateral Pulmonary Embolization, Acute" with other significant conditions contributing to death including "COPD (Pneumoconiosis)[,] Coronary Arteriosclerosis, mod. to severe, L.V. Hypertrophy[,] Diverticulosis, colon. Lower Aorta Atherosclerosis." (D-49; C-21) Dr. Blake's note on the provisional autopsy diagnosis indicates that it had been sent to Dr. Sexton on December 26, 1989, and so it can be inferred that the information from the provisional autopsy diagnosis was reflected in Dr. Sexton's assessment of the cause of death. (D-55) But it appears that, in addition to the oral notice, he had only the brief clinical summary, gross autopsy examination, and microscopic description, but not the final diagnosis, prepared later, in his records. (D-50). Thus, the basis for his reference to "COPD (Pneumoconiosis)" is not established. Dr. Sexton's name also appears on the forms recording the results of the blood gas studies performed on December 11, 15, and 17, 1989, but not the others. (C-32) The extent of his involvement with the Miner is not apparent from the evidentiary record.

Discussion and Conclusions of Law

Admissibility of Certain Evidence from the Survivor's Claim
or Procured by the Respondent in the Survivor's Claim

[29]Dr. Jesse L. Walker's and Dr. Frank T. Smith's qualifications have not been established of record.

Because the Miner has been deceased for more than a decade, no relevant change in the Miner's physical condition can have occurred since the last denial, regardless of new evidence. Therefore, there is no change in conditions under §725.310. *See Gen'l Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982); *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987); *Lukman v. Director, OWCP*, 11 BLR 1-71 (1988)(*Lukman II*) However, the tortuous history of the Miner's claim, including three remands by the Benefits Review Board requiring further consideration, and numerous allegations and findings on appeal of mistaken factual determinations establishes that historically there have been mistakes in determinations of fact, some of which remain unresolved, so that judicial efficiency and applicable law require a review of the entire record *de novo* and determination of the Miner's claim on the merits pursuant to the Claimant's request for modification . Since *de novo* consideration of the evidence and issues, including the existence of pneumoconiosis, is required, no prior substantive determinations on the merits by prior adjudicators are binding upon this tribunal, although the directives of the Benefits Review Board identify certain issues which require particular resolution by this tribunal.[30] *See Consolidation Coal Co. v. Director, OWCP [Worrell]*, 27 F.3d 227 (6th Cir. 1994); *Kovac v. BCNR Mining Corp*, 14 BLR 1-156 (1990), *aff'd on recon*., 16 BLR 1-71 (1992); *Dingess v. Director, OWCP*, 12 BLR 1-141 (1989); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988);*Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In this regard the copious materials, both evidence and argument, submitted by the Claimant's lay representative have been carefully considered in detail, and those contentions which have been advanced by Claimant, and which are deemed material to the issues which must be resolved, are treated herein to the extent appropriate.

Claimant contends that the curriculum vitae of Dr. Blake and the consultative report and curriculum vitae of Dr. Kleinerman should be excluded from the evidentiary record because the Director is respondent and because 30 U.S.C. §934(b)(1)(B) bars operators such as Employer from any involvement in the determination of claims for benefits to be paid by the Black Lung Disability Trust Fund, which would occur because the Director is Respondent.[31] Claimant

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[30]Claimant contends that §725.310 does not authorize a readjudication of any fact already established unless there has been a mistake or a material change in conditions. (D-136) His concern is specifically directed to the existence of pneumoconiosis allegedly established by Dr. Naeye, and findings by a claims examiner and Judges Thomas and Kichuk when they invoked the interim presumption at §727.203. The Claimant's request for modification now subjects these prior findings to scrutiny for error in any past finding of fact.

[31]In pertinent part the statute referred to provides:
Sec. 934. "Fund" defined; liability of operators to United States for repayments to fund; procedures applicable; rate of interest

(a) For purposes of this section, the term "fund" has the meaning set forth in section 902(h) of this title.
(b)(1) If (A) an amount is paid out of the fund to an individual entitled to benefits under section 932 of this title, and (B) the Secretary determines, under the provisions of sections 932 and 933 of this title, that an operator was required to secure the payment of

alleges a generalized violation of due process, and further contends that the Miner's claim would be prejudiced by simultaneous prosecution of the two cases, in effect, because two respondents, instead of just the Director, would be marshaled against her as she prosecutes the Miner's claim.

Claimant contends that Dr. Kleinerman's report should be discredited because the doctor did not consider all evidence available to him, particularly Dr. Naeye's finding of pneumoconiosis. The fact that either of the two consulting physicians who examined the autopsy slides did not see the other's report is immaterial, since they were neither treating nor examining physicians. Claimant also contends that Judge Kichuk improperly used Dr. Kleinerman's report as a basis for denial of benefits. In this regard, since Judge Kichuk's decision and order were vacated on appeal, his findings are without relevance to or effect upon the pending claim. Claimant also points out that, in its Decision and Order at p. 3 of 94-0666-BLA, dated May 31, 1996, the Benefits Review Board sustained the Director's characterization that "Dr. Klienerman's [sic] opinion ruling out pneumoconiosis as a cause of the miner's death is entitled to little, if any, weight in this case arising within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993)." That characterization is no longer applicable because different relevant factual findings have been made with respect to the existence of pneumoconiosis following the current review and analysis of the record as it has been developed before this tribunal.

In its response to Judge Wood's order canceling the scheduled hearing and to show cause served July 9, 1999, the Director contended that 30 U.S.C. §934(b)(1) is not any kind of a bar to the admission of evidence or otherwise, because the Employer operator which is the respondent to the survivor's claim has not brought or intervened in any proceeding "held for the purpose of determining claims to be paid by the fund." The Director contends that the Employer operator would only be present at a hearing to defend its interests in the claim to which it is a party. The Director also contends that the two claims, the Miner's claim and the survivor's claim, are indeed separate, but that the evidence in the two claims is essentially the same.

The plethora of procedural arguments related to the segregation of the case are now moot, and need not be addressed or readdressed individually. Judge Wood in her order of remand dated August 6, 1999, has construed Claimant's argument as a contention that involving the Employer in the Miner's claim would be tantamount to allowing the Employer to intervene in a claim brought against the Trust Fund in contravention of 30 U.S.C. §934(b)(1), noting that (b) cannot be read without the remainder of the section. With respect to Claimant's objection to the

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> all or a portion of such benefits, then the operator is liable to the United States for repayment to the fund of the amount of such benefits the payment of which is properly attributed to him plus interest thereon. No operator or representative of operators may bring any proceeding, or intervene in any proceeding, held for the purpose of determining claims for benefits to be paid by the fund, except that nothing in this section shall affect the rights, duties, or liabilities of any operator in proceedings under section 932 or section 933 of this title. In a case where no operator responsibility is assigned pursuant to sections 932 and 933 of this title, a determination by the Secretary that the fund is liable for the payment of benefits shall be final.

Director's having blended the evidence in the two claims, she ruled that there was "good cause for administratively segregating the two claims," but held that "the same evidence would appropriately be incorporated into each new set of Director's exhibits, although the files need not have identical contents." She found no "reason why any party in one claim may not obtain and use evidence filed with respect to the other, provided that appropriate evidentiary and procedural rules are followed." She left open the issue of consolidation at the Administrative Law Judge's level following remand.

There is no reason to disturb Judge Wood's ruling. There is no utility in consolidating the cases for hearing or determination at this stage of the proceeding. Moreover, there is no bar to the common use of evidence in the two cases, even if the evidence was adduced by the Respondent Employer with respect to the survivor's claim. *Cf. Hardisty v. Director, OWCP*, 776 F.2d 129, 8 BLR 2-72 (7th Cir. 1985). The plain language of the statutory provision that Claimant relies upon is patently inapplicable to the circumstances of this case, in part because the conditions precedent are not met. No amount has been paid out of the fund, and the Secretary has not determined that an operator was required to secure payment of benefits. No prohibited initiation of or intervention in a proceeding by the Employer Respondent or its carrier is involved in this case. The Employer Respondent in the survivor's claim has no standing with respect to the Miner's claim, as the Director suggests, and the bar to intervention specified in 30 U.S.C. §934(b)(1)(B) of the Act does not apply. Moreover, this tribunal, in any event, may take judicial notice of the *curricula vitae* of the doctors. *See Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 BLR 1-135 (1990).

To the extent that it is explicit, the rationale for Claimant's argument does not establish a basis for the exclusion of the identified evidence. Claimant's objection is overruled. The District Director has marshaled the evidence as required pursuant to §§725.404-725.407, 725.414-725.415, and transmitted it to the Office of Administrative Law Judges pursuant to §725.421 as applicable. It is a violation of the Administrative Procedure Act for the Administrative Law Judge not to address specifically all the material medical opinions of record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). The Act mandates that all evidence relevant to claims for black lung benefits "shall be considered." 30 U.S.C. §923(b); *see Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949-50, 21 BLR 2-23, 2-29 (4th Cir. 1997). Therefore, the curricula vitae of Dr. Blake and Dr. Kleinerman, and the report of Dr. Kleinerman are properly considered, and Claimant's objections to the admissibility thereof are overruled. Claimant's disagreement over the reasons for the remand for modification proceedings is moot. (D-136)

Proof of Entitlement via the Interim Presumption

Under Part 727 benefits are provided to a miner who is totally disabled due to pneumoconiosis and to certain survivors of a miner who died due to or while totally disabled by pneumoconiosis. §727.201 For the purposes of the Act, pneumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. The definition includes, but is not limited to, a variety of specific conditions arising out of coal mine employment, and includes any chronic pulmonary disease

resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in coal mine employment.[32] §727.202

Part 727 allows a claimant to invoke an interim presumption of total disability due to pneumoconiosis, or total disability due to pneumoconiosis at the time of death, or that death was due to pneumoconiosis arising out of that coal mine employment if certain criteria are met. These are, first, a chest x-ray, biopsy, or autopsy establishes the existence of pneumoconiosis. §727.203(a)(1) *See Cartwright v. Gibraltar Coal Co.*, 5 BLR 1-325 (1982). Second, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease of minimum specified duration and which are qualifying under applicable regulations. §727.203(a)(2) Third, blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood with qualifying values pursuant to applicable regulations. §727.203(a)(3) Fourth, other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment. §727.203(a)(4). There is provision for specified alternative proof which is inapplicable in this case involving a deceased miner because substantial medical evidence is available.

Claimant has the burden of providing at least ten years of qualifying coal mine employment. *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984) Under applicable law prior to the recent amendments of the regulations any reasonable method of computation supported by substantial evidence in the record considered as a whole is acceptable. *See Clayton v. Pyro Mining Co.*, 7 BLR 1-551 (1984). That standard has not changed with respect to Part 727. As previously indicated, Claimant is deemed to have established twelve years of coal mine employment under Part 727.

The interim presumption can be rebutted pursuant to §727.203(b) if the evidence establishes (1) that the miner is doing his usual coal mine or comparable and gainful work; (2) that he is able to do such work; (3) that the disability or death of the miner did not arise in whole or in part out of coal mine employment; or (4) that the miner did not have pneumoconiosis. Under the third criterion under established law of the Sixth Circuit the party opposing entitlement must submit medical evidence sufficient to support a finding that pneumoconiosis in no way, not even in a marginally significant manner, contributed to a miner's total disability or death. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).[33]

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[32]As noted, consideration of the Miner's claim under Part 727 is not substantially affected in this regard by the amendment of Parts 718 and 725 effective January 19, 2001. Federal Register, Vol. 65, No. 245, p. 79920 (Dec. 20, 2000).

[33]Claimant has moved that a "de minimis standard" adopted in the Fourth and Seventh Circuits be applied in this case which is governed by the law of the Sixth Circuit. The motion as framed must be denied. Claimant's reference is apparently to the principle that pneumoconiosis is deemed to be a contributing cause of a claimant miner's death if it "hastened" the miner's death. The standard is explicitly incorporated in amended §718.205(c)(5), which applies to survivor's claims. Part 727 with its attendant interim presumptions and particular criteria for

Claimant contends that chronic obstructive pulmonary disease and progressively severe bronchitis and emphysema qualify as pneumoconiosis under the definition in the regulations. The applicable definition of pneumoconiosis under the Act includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in coal mine employment" under §727.202. The conditions which Claimant identifies could be included within the legal definition of pneumoconiosis, but only if the critical causal relationship between the conditions and the Miner's exposure to coal dust were established by a preponderance of the medical evidence of record. Claimant's assertion that Dr. Naeye's finding of moderately severe to severe centrilobular emphysema is a condition that can be defined as pneumoconiosis, and that the finding attests to the miner's disability, is misplaced to the extent that, absent proof of a causal relationship with coal dust, the centrilobular emphysema would not qualify as clinical or legal coal workers' pneumoconiosis. There is no such proof in this record; indeed, there is an explicit disclaimer by Dr. Naeye.

To invoke the interim presumption a physician's opinion must establish the presence of a totally disabling respiratory or pulmonary impairment. Though Dr. Naeye found moderately severe to severe centrilobular emphysema, which suggests a respiratory or pulmonary impairment, he did not explicitly assess it as disabling to any degree. Likewise, all three doctors who assessed the evidence generated by the autopsy commented on the obviously deleterious effects of the pulmonary embolization which led to the Miner's death, but none provided no assessment of the degree of impairment attributable to that condition which was not related to coal mine employment. Such an assessment would be a medical judgment in this context which can not properly be made by this tribunal on this record, especially since Dr. Naeye opined categorically that any condition related to coal mine dust was too mild to effect an impairment of any degree.

If the interim presumption were deemed to have been invoked by the physicians' medical opinions, the dispositive issue in this case would be whether the interim presumption has been rebutted under §727.203(b)(3), which allows the respondent to rebut the interim presumption by establishing that the Miner's total disability or death was not caused in whole or in part out of coal mine employment. In the Sixth Circuit a respondent must demonstrate that the miner's pneumoconiosis is not a contributing cause of total disability or death, or, stated alternatively, that pneumoconiosis played no part in causing the Miner's disability or death. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S.

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their invocation applies to the Miner's claim, and the proposed standard has no practical application to the criteria for invocation. However, the standard might be applied under Part 727 with respect to rebuttal of the interim presumption, if invoked under §727.203(a), provided that the pneumoconiosis deemed to have hastened death was caused by coal mine employment. Proof that the Miner's death was hastened by pneumoconiosis would be a material circumstance which could defeat rebuttal under §727.203(b)(3), because such rebuttal requires proof that disability or death did not arise in whole or part out of coal mine employment,. *See Roberts v. Benefits Review Board*, 822 F.2d 636, 10 BLR 2-153 (6th Cir. 1987); *cf. Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989).

1116 (1985). The Sixth Circuit is among those which require the party opposing entitlement to "rule out the causal relationship between the miner's total disability and his coal mine employment." *See Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. den*. 114 S. Ct. 683 (1994). This tribunal finds that this standard for rebuttal would be satisfied in this case. It also finds that the interim presumption would be rebutted under §727.203(b)(4), because the preponderance of the evidence establishes that the Miner did not have pneumoconiosis.

X-ray Evidence

The record discloses evidence of eleven x-rays interpreted by various doctors over a period from 1956 to December 20, 1989. None of these interpretations is conforming and positive for pneumoconiosis. Two of the x-rays were reread. Dr. Dukes, a board-certified radiologist, interpreted the July 16, 1973, x-ray of satisfactory quality as 0/0. Dr. Pongdee's negative reading of the October 6, 1981, x-ray was not contradicted by Dr. Sargent, a board-certified radiologist and B-reader, who reread the film as 0/1, which is not evidence of pneumoconiosis under applicable regulations. §718.102(b) Dr. Prater's negative reading of the February 20, 1989, x-ray was not contradicted by Dr. Gordonson, a board-certified radiologist and B-reader, who found the film unreadable. Dr. Gordonson read the December 20, 1989, x-ray as negative. Dr. Cohen, a board-certified radiologist, provided nonconforming interpretations of x-rays dated October 21, October 24, and November 6, 1989, in each case identifying COPD and indicating no active lung disease, but not referring to pneumoconiosis and not providing classifications pursuant to the ILO-U/C International classification. Thus, there is no basis for invocation of the interim presumption based on positive x-ray evidence pursuant to §727.203(a)(1). There is no evidence of biopsy of record.

Autopsy

Autopsy evidence is deemed the most reliable method of ascertaining the existence of pneumoconiosis. *See Kimick v. National Mines Corp*., 2 BLR 1-221 (1979) There is evidence of an autopsy of the miner performed shortly after his death on December 20, 1989, and, therefore, prior to the survivor's claim filed on April 10, 1990. (D-36) The autopsy was performed by Dr. Blake, who as prosector is board-certified in anatomic and clinical pathology. What purports to be a complete copy of the autopsy protocol in evidence conforms to applicable regulatory requirements of §410.428 and §718.106. Dr. Naeye's incidental statement that he did not receive a complete description of the heart which would allow assessment of cor pulmonale is not construed as establishing that the autopsy report of record is incomplete or nonconforming.

The autopsy protocol prepared by Dr. Blake does not explicitly or implicitly establish the existence of pneumoconiosis. The "Brief Clinical Summary" at the beginning of the autopsy protocol indicated that Dr. Blake was familiar with the Miner's medical history over the last two months, his smoking history, and a coal mine history of underground exposure for approximately twelve years. Dr. Blake's "Final Pathological Diagnoses" included no reference to pneumoconiosis, notwithstanding that he listed pulmonary emboli, pulmonary congestion and

edema, and pulmonary emphysema as his first three diagnoses.[34] Dr. Blake's categorical declaration that his pertinent findings were insufficient for a finding of anthracosilicosis of any degree, implies that the scope of his assessment included the possibility of pneumoconiosis. His final pathological diagnoses pertained to what was obviously pervasive and serious lung disease, particularly involving pulmonary emboli, which he identified as the secondary cause of death after the immediate cause of respiratory arrest attributed to the pulmonary embolization, as well as pulmonary emphysema, congestion, and edema. However, he concluded from his conduct of the autopsy that there was only the possibility of previous coal dust exposure. He did not record any observation of black or anthracotic pigment or deposits in his "Gross Autopsy Examination."

The fact that he did not identify coal workers' pneumoconiosis explicitly, and the fact that he expressly ruled out anthracosilicosis and declared that the existence of several very small fibroanthracotic nodules which were present throughout the parenchyma of the lungs, though they were deemed to small to support a diagnosis of anthacosilicosis of any degree, indicated possible previous coal dust exposure, is also evidence that Dr. Blake specifically considered the possibility of pneumoconiosis and rejected it in reaching his overall assessment.[35] Therefore, the existence of pneumoconiosis is not established by Dr. Blake's autopsy protocol; indeed it is ruled out, and that autopsy report is not a basis for invocation of the interim presumption pursuant to §727.203(a)(1). Though he opined as to the cause of death, Dr. Blake did not opine explicitly as to the extent of any disability or impairment caused by the pulmonary conditions he observed.

Dr. Naeye's consultative report dated September 10, 1990, was explicitly based on Dr. Blake's autopsy report and examination of thirteen lung tissue slides among twenty seven glass slides and twenty-seven tissue blocks developed from the autopsy. Presumably, therefore, Dr.

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[34]His "Comment" relative to the Final Pathologic Diagnoses stated, in relevant part, "The immediate cause of death is felt to be respiratory arrest due to pulmonary embolization, both recent and old. The terminal event most likely was an acute cardiac arrhythmia brought about by myocardial hypoxia resulting from recent pulmonary embolization superimposed on the presence of remote pulmonary emobli (sic) within major pulmonary vessels. Within the last few weeks or months this patient has pulmonary embolizations which were now blocking major pulmonary arteries and were becoming adhered to the walls of these vessels by fibrosis and organization of these thrombi. This could possibly explain some of this patient's recent pulmonary symptoms. Several very small fibroanthracotic nodules are present throughout the parenchyma of the lungs, indicating possible previous coal dust exposure. However, these nodules are all 2 mm or less in size and are insufficient for diagnosis of anthacosilicosis of any degree." (D-55)

[35]The "Microscopic Description," in pertinent part, stated, ""Some sections of lung show mild to focally moderate emphysema. In the multiple sections examined there is no significant interstitial fibrosis. A few pulmonary medium to small arteries show prominent mural thickening. Patchy areas throughout the lungs show congestion and focal pulmonary edema. Occasional small pulmonary parenchymal nodules show fibrosis with aggregates of anthracotic ladden (sic) histiocytes; however, these nodular foci measure less than 2 mm in diameter. One large intrapulmonary vessel is almost entirely occluded with old clot, which has an organizing attachment to the wall of the vessel, indicating that this has been there at least a few days. Other larger pulmonary vessels contain portions of more recent clot." (D-55)

Naeye was aware of the same medical, smoking, and coal mine employment histories to the extent that Dr. Blake referred to them in his brief clinical summary. Like Dr. Blake, who referred to "mild to focally moderate emphysema," Dr. Naeye noted focal emphysema around several of the small black deposits, but noted that this type of emphysema constituted less than 1% of the total emphysema in the lung sections. Dr. Blake did not refer in his Microscopic Description to the moderately severe to severe centrilobular emphysema which Dr. Naeye noted. Dr. Naeye noted the absence of microscopic evidence of chronic bronchiolitis, which also was not mentioned by Dr. Blake.

Dr. Naeye did observe the extensive pulmonary arterial emboli which Dr. Blake had observed. Whereas Dr. Blake had expressly noted no significant areas of pulmonary fibrosis in either lung, either grossly or microscopically, Dr. Naeye noted a few small foci of interstitial fibrosis without associated black pigment. Dr. Naeye's observation of a small amount of black pigment in the lung sections, free in the tissues, mainly adjacent to arteries and small airways, and very rarely in the subpleural space, gave apparent support to his conclusion that, because none of the black deposits reached 1 mm. in diameter, they were too small to be classified as anthracotic micronodules. Dr. Naeye's observation of a small amount of fibrous tissue, but no tiny birefringent crystals admixed with the black pigment, appears consistent with Dr. Blake's findings, though somewhat more detailed because of the reference to the birefringent crystals. This finding of Dr. Naeye's appears to be not inconsistent with Dr. Blake's notation that "Occasional small pulmonary parenchymal nodules show fibrosis with aggregates of anthracotic ladden (sic) histiocytes; however, these nodular foci measure less than 2 mm in diameter." Indeed, although Dr. Naeye labeled certain of his particular findings "pneumoconiosis," albeit mild, they appear indistinguishable in their underpinnings from those of Dr. Blake, who, as the prosector, did not find pneumoconiosis.

Dr. Naeye's opinion is ambiguous as to whether he found pneumoconiosis in spite of, or because of, the absence of the birefringent crystals. That ambiguity renders his finding ambiguous to the extent that it is not based exclusively on the fibrous tissue associated with the anthracotic deposits which he observed. However, this concern aside, it is evident from a close reading of Dr. Naeye's repeated references to "black pigment" and "black deposits" and "anthracotic deposits" in his opinion that he used the terms interchangeably, and that the deposits upon which he apparently based his diagnosis were deposits of "anthracotic pigmentation" which is not sufficient, by itself, to establish the existence of pneumoconiosis under applicable regulations. §718.202(a)(2) In the Sixth Circuit, a finding of pigmentation described as "yellow-black consistent with coal pigment" had been found insufficient to support a finding of pneumoconiosis. *See Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995). Dr. Naeye identified no other basis for his finding of pneumoconiosis in his report. Dr. Naeye's opinion, therefore, does not support a finding of pneumoconiosis by autopsy upon which invocation of the interim presumption may be properly based under §727.203(a)(1).

Dr. Naeye specifically opined that the centrilobular emphysema which he observed was unrelated to occupational exposure to coal or coal mine dust. His "findings of a very mild, simple coal worker's pneumoconiosis" "characterized by the presence of some small anthracotic deposits with a small amount of fibrous tissue but no tiny birefringent crystals" which was "far too mild to have prevented [the Miner] from doing any kind of work, including hard physical

work, in the coal mining industry" and "far too mild to have contributed in any way to his death," are construed as a subjective, only slightly more positive assessment of a very marginal condition as it related to possible coal miner's pneumoconiosis. Like Dr. Blake, Dr. Naeye attributed the Miner's death to the pulmonary arterial emboli, Thus, the phenomena or conditions underlying the differing opinions appear to be virtually the same, with only *de minimis* distinctions, if any. The impression, therefore, is that there is actually very little difference in the opinions of Dr. Naeye and Dr. Blake insofar as their objective underpinnings are concerned. In any event, Dr. Naeye's opinion, to the extent it is distinguishable in substance from Dr. Blake's, is insufficient to overcome the negative findings of Dr. Blake, the prosector, individually, or in combination with the negative findings contained in Dr. Kleinerman's reasoned opinion. The qualifications of these three doctors are comparable.

His consultative report dated April 11, 1991, indicates that Dr. Kleinerman had reviewed records relating to the Miner's occupational history, medical records, including hospital records, the autopsy report, and consultation reports from Drs. Fox, Pearson, Long, and Walker, the death certificate, and the autopsy protocol, and relevant histological slides. (C-14; D-132) He had taken account of eleven years in underground coal mines and additional exposure at strip mines, as well as an unquantified smoking history ending in 1956. This was a substantially more extensive review of relevant records than either Dr. Blake or Dr. Naeye recorded, and tends to reinforce the credibility of his findings. Dr. Kleinerman examined the same slides prepared by Dr. Blake that Dr. Naeye examined.

Dr. Kleinerman observed the pulmonary thromboemboli of various ages and descriptions described by Drs. Blake and Naeye. His stated conclusion differed from Dr. Naeye's in that he found "[n]o definitive lesions of simple or complicated coalworkers pneumoconiosis, simple nodular silicosis or conglomerate silicosis." But he apparently observed phenomena quite similar to those described by Dr. Naeye from the tissue slides. He found small amounts of black granular pigment in the subpleural, perivascular and peribronchiolar connective tissue of the lung, and a minimal degree of centriacinar emphysema as Dr. Naeye did. Dr. Naeye's findings of "very mild, simple coal worker's pneumoconiosis" based on "the presence of some small anthracotic deposits with a small amount of fibrous tissue but no tiny birefringent crystals," seems to refer to the black granular pigment that Dr. Kleinerman referred to. Among the three pathologists only Dr. Naeye mentioned the absence of "birefringent crystals." Although Dr. Blake recorded no observation of anthracotic deposits in his gross examination, his notation of "[o]ccasional small pulmonary parenchymal nodules show fibrosis with aggregates of anthracotic ladden (sic) histiocytes; however, these nodular foci measure less than 2 mm in diameter," which he categorically opined were insufficient for diagnosis of anthracosilicosis of any degree, seems to refer to the same phenomena described by Dr. Kleinerman and Dr. Naeye.[36]

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[36]With the aid of Dorland's Pocket Medical Dictionary (23d ed.), of which judicial notice is taken, it is apparent that histiocytes are macrophages, which are large mononuclear cells that occur in the walls of blood vessels and loose connective tissue which ingest microorganisms or other cells and foreign particles. Dr. Blake indicates that he deems them a nodular phenomenon. Dr. Naeye found the black deposits at less than 1 mm. too small to be classified as anthracotic micronodules.

Dr. Kleinerman also found minimal subpleural airspace enlargement with fibrosis not associated with the deposition of black granular pigment and wholly unrelated to coal mine dust. He observed focal silicotic fibrosis and small amounts of black granular pigment in no more than 20% of the lymph node parenchyma, noting categorically that this phenomenon was limited to the lymph nodes and was not present in the lung. He, like the other pathologists, opined that death was the result of the thromboemboli. He opined that, because coal workers' pneumoconiosis or silicosis was not present in the lung, it did not in any way contribute to the Miner's death. As previously noted, he did not expressly assess the extent of the Miner's disability, if any, prior to his death. Thus, Dr. Kleinerman's opinion that there is no evidence of coal workers' pneumoconiosis is deemed to be generally consistent with the findings of Dr. Blake, and, as explained, with the underlying basis for the findings of Dr. Naeye, though not his explicit conclusion. Dr. Kleinerman's opinion does not explicitly assess the extent of any pulmonary or respiratory impairment which might have existed prior to the Miner's death.

Pulmonary Function Studies

The pulmonary function studies of record are nonconforming, and as such are not a proper basis for invocation of the interim presumption pursuant to §727.203(a)(2). Those performed by Dr. Fox and Dr. Swann do not provide precise values in accordance with applicable regulatory standards, and Dr. Smith's test results were properly invalidated by Dr. Kraman because of insufficient tracings
as well as inadequate effort, cooperation and comprehension.

Arterial Blood Gas Studies

Claimant contends that of the twelve blood gas studies of record, seven are qualifying, and that the interim presumption should be invoked on that basis pursuant to §727.203(a)(3). (C-132) All such studies of record must be weighed and their relative probative values rationalized. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972 (1980). Claimant suggests that the modification proceedings are driven by newly discovered and submitted blood gas studies. (Claimant's letter dated July 6, 1998 included under D-136) Claimant contends that certain blood gas studies which the Claims Examiner did not summarize were improperly disregarded because the Claims Examiner improperly or erroneously determined they were not indicative of the Miner's usual state of health. (D-136) However, it is error to admit evidence submitted on modification where the evidence was in existence at the time the original decision was issued, because §725.456(d) and *Wilkes v. F&V Coal Co.*, 12 BLR 1-1 (1988) mandate the exclusion of withheld evidence in the absence of extraordinary circumstances.[37] What Claimant has characterized as newly discovered blood gas studies in question were obviously in existence prior to the Miner's death in 1989. However, the apparently unexplained and long unremedied failure of the medical facility to disclose and produce these study results as requested; the fact that the studies were performed at or shortly before the Miner's death, and the manifest diligence of the Claimant's lay representative viewed

[37]Section 725.456(d) has been eliminated in the December 20, 2000, amendments to Part 725, but amended §725.2(c) renders the change inapplicable to this claim because it was pending on January 19, 2001.

in the context of the record as a whole, converge to establish what this tribunal deems to be extraordinary circumstances and, therefore, that the evidence is admissible within the exception provided in §725.456(d). The blood gas studies have been considered as deemed appropriate by this tribunal.

Only tests conducted in conformity with applicable regulations are sufficient to invoke the interim presumption.[38] *See Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989). Section 727.206(a) provides in relevant part with respect to quality standards applicable to evidence, "No...blood gas study which does not or did not meet the quality standards applicable at the time the evidence was submitted shall be considered sufficient to invoke the interim presumption provided in §727.203(a)...." Since all of the blood gas studies in evidence were performed after March 31, 1980, the effective date of Part 718, the quality standards specified in that Part apply. §727.206(a) In the Sixth Circuit Part 718 quality standards are applicable to Part 727, if the evidence was submitted after March 31, 1980, the effective date of Part 718. §727.206(a) See *Prater v. Hite Preparation Co.*, 829 F.2d 1363, 10 BLR 2-297 (6th Cir. 1987); *Wiley v. Consolidation Coal Co.*, 892 F.2d 498, 13 BLR 2-214 (6th Cir. 1989). But quality standards listed in §718.103 are not exclusive. *Bowlin v. Director, OWCP*, 825 F.2d 410 (6th Cir. 1987)(unpublished). Also, a claimant's entitlement is measured by his physical condition at the time of the hearing or, if he has died before the hearing, the issue is whether he was disabled no later than the month preceding his death. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982); *see also Roberts v. West Virginia CWP Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); §725.203(b)(1). Section 718.105 governs conformity standards for arterial blood gas studies.

In order to render a blood gas study unreliable, there must be proof to that effect based on medical opinion. *See Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Cardwell v. Circle B Coal Co.*, 6 BLR 1-788 :(1984). Arterial blood gas studies are not necessarily unreliable because performed during an emergency hospitalization, and qualified expert medical testimony is required to establish such unreliability. *Jeffries v. Director, OWCP*, 6 BLR 1-1013 (1984) There is no such testimony in this record.

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[38]Amended §718.101(b) provides that the standards revised by the December 20, 2000, amendments are applicable to claims governed by Part 727 only if the tests are conducted after January 19, 2001. The previously applicable quality standards in Part 718 as they existed prior to the December 20, 2000, amendments have been applied to the evidence material to this claim under Part 727 as appropriate. However, for purposes of review under Part 718, §718.105(d) provides, "If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary conditions. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death." The absence of the requisite report would preclude use of the nonconforming blood gas test results relied upon by Claimant in relation to this claim. The thrust of the amended provision also lends support to this tribunal's suggestion that the reliability and probative value of the nonconforming blood gas tests performed during the Miner's last hospital admission is suspect.

Section 718.105(b) provides, prior to amendment, that a blood-gas study shall initially be administered at rest and in a sitting position, and if nonqualifying, the miner should be offered an exercise test if not medically contraindicated. Section 718.105(c) provides that "any report of a blood-gas study submitted in connection with a claim shall specify: (1) Date and time of test; (2) Altitude and barometric pressure at which the test was conducted; (3) Name and DOL claim number of the claimant; (4) Name of technician; (5) Name and signature of physician supervising the study; (6) The recorded values for pCO2, pO2, and pH, which have been collected simultaneously...; (7) Duration and type of exercise; (8) Pulse rate at the time the blood sample was drawn; (9) Time between drawing of sample and analysis of sample; and (10) Whether equipment was calibrated before and after each test."

The evidence of the blood gas studies relating to the Miner are comprehensively nonconforming in several significant respects. Apparently, all of the tests, except for Dr. Smith's test in 1981, were administered while the Miner was hospitalized, and are recorded on a form which does not disclose that the tests were administered in a sitting position at rest, or that the equipment was properly calibrated. Nor does it disclose the pulse rate, the barometric pressure or altitude, the name of the technician, or the name and signature of the supervising physician. However, the initials of the otherwise unidentified analysts appear on the forms, other unidentified initials appear on some of the forms, and Dr. Burrell is identified as the physician with respect to the tests taken on October 24 and 26, and December 20, and Dr. Sexton is identified as the physician with respect to the tests taken on December 11, 15, and 17, 1989. It is not clear from the forms or otherwise that those doctors were supervising physicians, and though Dr. Giles is identified in the letterhead of the forms as the Medical Director, there is no evidence that he was involved in the actual testing. No doctor is identified with respect to the October 21 or November 5, 1989, tests, the latter of which is not among the tests submitted by the Claimant. (D-56)

Since the Miner went into respiratory arrest at 1:00 p.m. on December 20, 1989, the last two arterial blood gas tests were taken after that event at 1:10 p.m. and 1:25 p.m., and while resuscitation was being futilely attempted; the previous one was five hours before that event when the Miner was admitted to the hospital on an emergency basis. Moreover, although there is no direct medical opinion specifically declaring any of the tests unreliable or not representative of the Miner's true lung function, it is incontrovertible on this record that at least the last two tests were taken while the Miner was effectively *in extremis* and, because they are reflective of that abnormal condition, would not reliably reflect his normal or usual condition. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998). The circumstances appear so extreme that the reliability of at least those tests for the purpose of invoking the interim presumption is fundamentally suspect.

Assuming for the sake of argument that the other arterial blood gas tests of record were conforming, they are numerically evenly divided, and so there is not a preponderance of these tests which is qualifying and which would establish total disability. The two tests on December 11 were divided, one was qualifying, one was not. The four tests taken in late October and early November 1989, were divided, two qualifying, two not qualifying. The 1981 test was not qualifying. The first test taken at 8:05 a.m. on December 20, 1989, upon emergency admission to the hospital on the date that he died was qualifying. Thus a preponderance of qualifying and

conforming arterial blood gas studies taken before the Miner was in respiratory arrest do not satisfy the requirements of §727.203(a)(3), and so do not support invocation of the interim presumption pursuant to that regulatory provision.

Other Medical Evidence; Physicians' Opinions

The interim presumption may also be invoked on the basis of "Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, [which] establishes the presence of a totally disabling respiratory or pulmonary impairment." A physician's opinion must establish the severity of the miner's respiratory impairment in order to support a finding of a totally disabling respiratory condition. *See Justice v. Jewell Ridge Coal Co.*, 3 BLR 1-547 (1981); *Sansone v. Director, OWCP*, 3 BLR 12-422 (1981). A diagnosis of chronic respiratory or pulmonary disease resulting in a "moderate" impairment has been held insufficient to establish total disability. *See Lesser v. C.F. & I. Steel Corp.*, 3 BLR 1-63 (1981). Likewise, a diagnosis of "severe coronary and pulmonary disease," without an evaluation of the extent of disability, has been held insufficient to support a finding of total disability. *See Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). *See also Tischler v. Director, OWCP*, 6 BLR 1-1086 (1984).

Dr. Sexton signed the death certificate on January 19, 1990. A death certificate standing alone is deemed an unreliable report of a miner's condition without indication that the signator had relevant qualifications or personal knowledge of the miner from which to assess the cause of death. *See Smith v. Cameo Mining, Inc.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *compare Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). It is apparent that Dr. Sexton had some personal familiarity with the Miner because his name appears occasionally on hospital treatment records identified with the Miner. Dr. Sexton identified the primary cause of death as "Bilateral Pulmonary Embolization, Acute." Identifying that primary cause of death does not disclose the extent of any disability or disabling respiratory or pulmonary impairment prior to the Miner's death. Among the several other significant conditions which he identified as contributing to death was "COPD (Pneumoconiosis)," but there was no related assessment of pulmonary impairment or disability. The opinion is not documented or reasoned. Dr. Sexton's name on some of the medical records suggests that he may have been a treating physician, but the extent of any such status is not established, so that there is no basis for application of amended §718.104(d), which provides for consideration of specified factors in order to give added probative weight to the opinions of treating physicians in appropriate cases.

There is also the evidence of Dr. Blake's note on the provisional autopsy diagnosis indicating that it had been sent to Dr. Sexton on December 26, 1989, prior to the date, January 19, 1990, when Dr. Sexton signed the death certificate, but his receipt or use of that information is not proved. The basis, if any, for Dr. Sexton's identification of "COPD (Pneumoconiosis)" is simply not disclosed, but is clearly not attributable to any explicit opinion in Dr. Blake's autopsy report, which explicitly and implicitly ruled out coal workers' pneumoconiosis. Nor does the death certificate by its very nature give any indication of any objective medical evidence upon which Dr. Sexton's assessment might have been grounded or any rationale for that assessment, although it was dated almost a month after the Miner's death. Thus, his opinion contained in the death certificate, such as it is, is neither documented nor reasoned, nor otherwise demonstrably

objectively based. Consequently, it does not establish the existence of pneumoconiosis, and does not establish the presence of a totally disabling respiratory or pulmonary impairment attributable to pulmonary embolization or any other cause prior to the Miner's death. The absence of documentation and explicit rationale renders Dr. Sexton's opinion reflected in the death certificate insufficient to satisfy the standards of §727.203(a)(4), and, in any event, it can be given little weight.

Dr. Fox's 1974 opinion that the Miner had chronic obstructive pulmonary disease on the basis of coal workers' pneumoconiosis, based on examination, including some testing and appropriate histories, is unclear in its meaning and so inadequately connected to the objective medical evidence he developed as to be effectively undocumented as well as unreasoned. The opinion is also twenty-five years old, and would look to corroboration by subsequent medical assessments if its assessment were accurate and valid. It does not establish a totally disabling pulmonary impairment, or the extent of any pulmonary impairment, in any event. Similarly, Dr. Swann's 1974 impression of possible coal workers' pneumoconiosis is equivocal, and, therefore, does not establish the existence of pneumoconiosis. He does not opine that the Miner had a totally disabling pulmonary impairment. Dr. Smith's brief 1981 assessment of chronic bronchitis and moderately disabling chronic obstructive pulmonary disease, which identified very limited documentation and no rationale, also falls short of an assessment of total disability, and did not refer to coal workers' pneumoconiosis or coal dust exposure. *See Lesser*. Consequently, it is not proof of coal workers' pneumoconiosis or the existence of a totally disabling pulmonary impairment. Neither Dr. Walker's 1990 report of treatment for acute bronchitis and irregular heart beat in 1989, nor the hospital records relating to those admissions and treatments, made any connection to coal mine dust exposure or coal workers' pneumoconiosis, nor did they make any assessment of a disabling pulmonary impairment. Those medical records also do not prove the existence of coal workers' pneumoconiosis or the existence of a totally disabling pulmonary impairment, and, thus, are not a basis for invocation of the interim presumption.

If, in addition to being analyzed as autopsy evidence, the three opinions relating to the autopsy and based upon the autopsy evidence were analyzed as other evidence under §727.203(a)(4), as documented and reasoned physicians' opinions, they could be deemed to suggest a totally disabling pulmonary disability attributable to the Miner's pulmonary embolization which their consensus indicates eventually caused his death. Dr. Blake did not assess a totally disabling pulmonary impairment as such. His focus was on the autopsy of the deceased Miner. However, in his comment he noticed the progressive pulmonary embolizations blocking major pulmonary arteries which developed over the last few weeks or months, and causing myocardial hypoxia and fatal acute cardiac arrhythmia. The description without more does not establish a totally disabling pulmonary impairment prior to the Miner's death explicitly, and does not satisfy the requirements of explicit assessment identified in *Justice, Sansone, Lesser*, and *Wheatley*. Dr. Naeye did not assess any particular extent of impairment related to the moderately severe to severe centrilobular emphysema, or the pulmonary arterial emboli, which he identified on the basis of the lung sections. He categorically declared that the very mild simple coal worker's pneumoconiosis which he discerned was too mild to have any effect on the Miner's work capacity or death. That was the only disability assessment relating to possible pulmonary impairment which Dr. Naeye made. For this tribunal to infer a time or

extent of pulmonary impairment or disability prior to the Miner's death from Dr. Naeye's assessment would be an impermissible medical judgment.

Likewise, Dr. Kleinerman, who found no evidence of coal workers'' pneumoconiosis, did not attribute any particular pulmonary impairment to any cause in the course of his narrative description of the records and autopsy evidence he examined, although he attributed the cause of death to the Miner's bilateral pulmonary thromboemboli. Thus none of these three opinions establish a totally disabling pulmonary impairment which would properly invoke the interim presumption under §727.203(a)(4). Consequently, this tribunal finds that Claimant has not satisfied any of the criteria for invoking the interim presumption pursuant to §727.203(a).

Rebuttal

Nevertheless, because the circumstances are unusual and because it is clear from the evidence as a whole that the Miner died with or from a confluence of serious pulmonary disorders, it is deemed appropriate to consider whether rebuttal would be established if the interim presumption were invoked, possibly under §727.203(a)(4). Even if the medical opinions were construed as establishing a totally disabling pulmonary or respiratory impairment, the interim presumption would nevertheless be rebutted on the basis of the evidentiary record. Rebuttal of the interim presumption may be effected under §727.203(b), provided all relevant medical evidence is considered, if, (1) the evidence establishes that the individual is doing his usual coal mine work or comparable and gainful work; or (2) the individual is able to do his usual coal mine work or comparable and gainful work; or (3) the evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or (4) the evidence establishes that the miner did not, have pneumoconiosis. The Director has the burden of going forward with the evidence to establish rebuttal of the interim presumption by a preponderance of the evidence. *See Burt v. Director, OWCP*, 7 BLR 1-197 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984).

Since the Miner has been deceased for a decade, was retired after July 1982, and since the rebuttal criteria under §727.203(b)(1) and (2) are framed in the present tense, rebuttal cannot be established under those two provisions. It is also established by the evidence that he was neither doing his usual coal mine work nor apparently capable of doing such work for a substantial period of time before his death, though the reasons for this are unresolved. Those criteria, therefore, do not apply. If the existence of pneumoconiosis were deemed to be established, rebuttal would not be possible under §727.203(b)(4). However, this tribunal's analysis of the evidence has established that the existence of pneumoconiosis has not been proved, and in effect has been ruled out, and so the interim presumption would be thus rebutted. *See Warman v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988).

Rebuttal under §727.203(b)(3) requires proof by a preponderance of the evidence that the total disability or death of the Miner did not arise in whole or in part out of coal mine employment. If the medical evidence is equivocal, rebuttal is not established under §727.203(b)(3). *DeKnuydt v. Zeigler Coal Co.*, 7 BLR 1-78 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). In the Sixth Circuit, the party opposing entitlement must provide medical evidence sufficient to establish that pneumoconiosis in no way, not even in a marginally

significant way, contributed to the Miner's total disability. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 , 1120, 7 BLR 2-53, 2-65 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). Under this standard, the party opposing entitlement "must rule out the causal relationship between the miner's total disability and his coal mine employment." *See Youghiogheny & Ohio Coal Co. v. McAngues,* 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. den*. 114 S. Ct. 683 (1994)(An employer cannot accomplish (b)(3) rebuttal by demonstrating that the miner has a second disability which is independent of his pneumoconiosis); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989)

The relevant inquiry is the cause of the miner's total disability, not the cause of his pneumoconiosis, which is irrelevant to rebuttal under this provision. *See Lucas v. Director, OWCP*, 11 BLR 1-61, 1-63 (1988). The Sixth Circuit has held that a finding of "no functional disability arising out of coal mine employment" was insufficient to establish (b)(3) rebuttal. *See Warman v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988). The Fourth Circuit has gone so far as to interpret the concept of ruling out the causal relationship between the miner's total disability and his coal mine employment as being satisfied "only where the relevant medical opinion states, without equivocation, that the miner suffers no respiratory or pulmonary impairment of any kind," ideally strengthened by an identification of what the physician considers the actual cause or causes of the miner's disability. If invocation occurs under §727.203(a)(1), physicians' opinion which address only the existence of a pulmonary impairment are insufficient to establish (b)(3) rebuttal. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984). The consequences of that doctrine are anomalous where, as here, the Miner died of a grave pulmonary disease unrelated to coal mining or coal dust.

The relevant and diverse evidence considered as a whole, as well as separately, within the context of this record effectively rules out coal mine employment as a contributing cause of total disability under the Act, which has not been proved, as well as the Miner's death. The medical opinions of Dr. Blake, Dr. Naeye, and Dr. Kleinerman, which are based primarily on evidence generated by the autopsy, are fairly deemed to be the most reliable evidence of the Miner's condition at the time of his death. Because the opinions are not expressly framed so as to rule out coal mine employment as the cause or a contributing cause of the Miner's death, they must be so interpreted by implication relative to those issues. This tribunal finds that the gist of those opinions, separately and together, is that the Miner had grave and disabling respiratory and pulmonary impairments from distinctive causes which were wholly unrelated to his coal mine employment.

The absence of any x-ray evidence which is positive for pneumoconiosis is consistent with such a conclusion. No evidence relates the arterial blood gas tests or the pulmonary function studies to coal mine employment. Lay opinions by the Miner or otherwise are not persuasive in this context. The other medical opinions, while sometimes suggesting, more or less gratuitously, that pneumoconiosis existed, and, in Dr. Sexton's opinion, that it was a contributing cause of death, constitute conflicting evidence, but are effectively discredited by their lack of explicit and persuasive underlying rationale based on objective medical evidence. Such evidence, also, is inherently less reliable than the much more recent pathologists' opinions formed on the basis of the autopsy and the autopsy slides. All three of those opining doctors, Dr.

Kleinerman, Dr. Blake, and Dr. Naeye, were board-certified pathologists, and so the reliability and credibility of their opinions were enhanced by their medical qualifications.

As previously discussed, the autopsy evidence is consistent with the conclusion that coal mine employment as a contributing cause of the Miner's pulmonary disability or impairment has been ruled out. Dr. Blake was explicit in his opinion that the immediate cause of death was respiratory arrest due to pulmonary embolization, both recent and old. He specifically considered the possibility of previous coal dust exposure and opined categorically that the several very small fibroanthracotic nodules that he observed were insufficient for diagnosis of anthacosilicosis of any degree. The conclusion, though hardly formulaic, may be fairly construed as ruling out any contributing effect whatever of pneumoconiosis to the Miner's disability or death.

From a different perspective, Dr. Naeye's diagnosis based on the autopsy slides of "very mild, simple coal workers's pneumoconiosis" explicitly and categorically rules out pneumoconiosis as a contributing cause of the Miner's disability or death, since Dr. Naeye opined that the "pneumoconiosis is far too mild to have prevented [the Miner] from doing any kind of work" and was "also far too mild to have contributed in any way to his death." Moreover, Dr. Naeye declared that the cause of death, which he identified as recurrent pulmonary arterial emboli, was nonoccupational, as was the Miner's centrilobular emphysema.

Finally, Dr. Kleinerman, who categorically ruled out the existence of coal workers' pneumoconiosis in any form, concluded that such a disease did not contribute to the Miner's death, and by implication, but not explicitly, suggested that such a disease would not have contributed to any disability of this Miner. Thus, if the interim presumption were deemed to have been invoked under §727.203(a), it would be deemed to have been rebutted under §727.203(b). Therefore, Claimant has not established entitlement to benefits under Part 727.

Entitlement Under Part 718[39]

Pursuant to §727.203(d) and Sixth Circuit authority, if the Claimant does not establish entitlement to benefits under Part 727, and the claim was filed prior to March 31, 1980, and adjudicated after that date, the claim must be considered under Part 718. *See Knuckles v. Director, OWCP*, 869 F.2d 99, 12 BLR 2-217 (6th Cir. 1989). A finding that the interim presumption has been rebutted under §727.203(b)(3) would preclude entitlement under Part 410. *See Pastva v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-629 (1985).

To be entitled to benefits under Part 718, Claimant must establish by a preponderance of the evidence that (1) the Miner suffered from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) that he was totally disabled; and (4) his total disability was caused

[39]Subparts C and D of Part 718 have been amended in part with respect to the determination of entitlement to benefits. §718.202, §718.204, §718.205, §718.301, Appendices B and C to Part 718; Federal Register, Vol. 65, No. 245, pp. 80048-51 (Dec. 20, 2000). The claim has been reviewed under Part 718 as amended, since by its terms it became effective on January 19, 2001, while this claim was pending. §725.3, §725.4

by pneumoconiosis. §§718.1, 718.202, 718.203, 718.204. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 415-16 (6th Cir. 1997); *Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986). For the purpose of the Act, "legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae, including, but limited to, any chronic restrictive or obstructive pulmonary disease, arising out of coal mine employment. "Clinical pneumoconiosis" included within the definition, consists of those diseases recognized by the medical community as pneumoconioses characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue caused by dust exposure in coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201.

Claimant contends that Miner's case should be reviewed under Part 718 and in particular the 15 year presumption under §718.305; that Judge Thomas found pneumoconiosis under 718, but did not review the claim under §718.305. Because this tribunal has reconsidered the evidence pertaining to the length of the Miner's coal mine employment under Part 727, and concluded that no more than twelve years of such employment have been established, and because the standards under amended Part 718 for determining length of coal mine employment in relation to the invocation of presumptions such as that provided in §718.305 are far more stringent, it is not necessary to evaluate the Miner's claim under §718.305. §718.301; §725.101(a)(32)

Claimant contends that BRB improperly directed ALJ not to rule under Part 718, contrary to §727.203(d), and that disability would be established by the evidence of arterial blood gas study results under §718.204(c)(2). Changed circumstances have rendered the issue moot, and the claim has been reviewed under Part 718. Claimant also contends that §§410.490 and 410.416 provide an applicable presumption that if a miner with ten years of coal mine employment has pneumoconiosis, the disease will be rebuttably presumed to be caused by the coal mine employment. Notwithstanding the Board's holding in *Muncy v. Wolfe Creek Collieries, Inc*., 3 BLR 1-627 (1981), Part 410 is not deemed to be applicable within the Sixth Circuit, which requires review under Part 718, if entitlement to black lung benefits is not established under Part 727. *Knuckles v. Director, OWCP*, 869 F.2d 996, 999, 12 BLR 2-217 (6th Cir. 1989). Section 727.203(c) and (d) provide that Part 718 is applicable to adjudication of the claim, except as otherwise provided. The Benefits Review Board advised with respect to this case, however, that if rebuttal is established under §727.203(b)(3), review under Part 718 is not required because, under the circumstances, it would be a futile undertaking against a finding that rules out coal mine employment as a cause of the miner's disability or death. This tribunal has concluded that if the interim presumption were invoked, rebuttal under §727.203(b)(3) would be effected, but has held that the interim presumption has not been invoked.

Looking to the legal definition of pneumoconiosis under §718.201, Claimant seeks to invoke §718.205(b)(2) by showing death due to multiple causes including pneumoconiosis and §718.205(c) to establish that death is due to pneumoconiosis where the cause of death is significantly related to or aggravated by pneumoconiosis, even where aggravation is of

preexisting conditions to a point of disability.[40] However, since the §718.205 applies only to survivor's claims, it has no application to the Miner's claim before this tribunal.[41]

As indicated explicitly in the amended regulations, "[c]linical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act" and "COPD, if it arises out of coal mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease apart from clinical pneumoconiosis." *See Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996) The legal definition of pneumoconiosis is not limited to clinical pneumoconiosis, as defined by the medical community, but encompasses a broader range of impairments which arise out of coal mine employment. 20 CFR §718.201; *see Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995).

Section 718.202(a), as amended, prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§ 718.304, 718.305, 718.306; or (4) the finding by a physician of pneumoconiosis as defined in § 718.201 which is based upon objective evidence and a reasoned medical opinion. The record contains no evidence of a biopsy, and the presumptions under §§ 718.304, 718.305, and 718.306 are inapposite, because there is no evidence of complicated pneumoconiosis, because, as noted previously, the Claimant has not established coal mine employment of fifteen years or more as

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[40]Claimant relies on the definition in 718.202(a)(1)(i)(B) that pulmonary or respiratory impairment means inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely ventilation, perfusion, and diffusion, and also asserts the significance of the relationship between aggravation of the Miner's lung conditions and hastening of death. The extent of the Miner's apparent pulmonary impairment at the time of death can be appreciated, but appropriate findings are circumscribed, as explained above, by the character and scope of the medical evidence of record. Claimant also seeks to establish within the scope of pneumoconiosis the diseases of Emphysema, Chronic Bronchitis, and Chronic Obstructive Pulmonary Disease. While these diseases can fit within the definition of so called legal coal workers' pneumoconiosis, the relationship depends upon medical proof of causation by coal mine employment and exposure to coal dust which is absent in this case.

[41]Claimant also contends that statement, "I feel that I have Black Lung Disease, that I'm totally disabled by it and that it was caused by my CME" is probative under 718.204(d)(1) as a statement before death by a deceased miner about his condition and should be considered in determining whether the miner was totally disabled at the time of his death. The statement was a statement of disagreement with a denial by the deputy commissioner and accompanied a request for a formal hearing dated July 26, 1984. (C-19, 20) The statement by the Miner, a lay person, is made under such circumstances, and so long in advance of the Miner's death, as to lack credibility, whatever its relevance. The condition precedent to its use, that there be no medical or other relevant evidence which addresses the Miner's pulmonary or respiratory condition, is obviously not satisfied. Moreover, §718.202(c) explicitly prohibits a determination of the existence of pneumoconiosis solely on the basis of a living miner's statements or testimony.

required by §718.301, and because the miner died after 1978.[42] With respect to §718.305, this tribunal has also found that total disability has not been established, and that death and any disability did not arise in whole or in part out of coal mine dust exposure.

The existence of pneumoconiosis requires consideration of "all relevant evidence" under §718.202(a), as specified in the Act. Thus, if a record contains both relevant x-ray interpretations and biopsy reports, the Act would prohibit a determination based on x-ray alone, or without evaluation of physicians' opinions that the miner suffered from "legal" pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). As previously discussed, neither the x-ray evidence nor the autopsy results of record establish the existence of pneumoconiosis.[43] The presumptions under §718.202(a)(3) are not applicable, as previously indicated. Also, as previously concluded, the opinions of those physicians who concluded that the Miner had pneumoconiosis were insufficiently documented and reasoned to support a finding of the existence of clinical or legal pneumoconiosis. Both Dr. Blake, the autopsy prosector, and Dr. Kleinerman, who relied on the most reliable autopsy evidence, ruled out the existence of pneumoconiosis. Close analysis of Dr. Naeye's opinion that the Miner had mild, nondisabling pneumoconiosis relied on the same observed medical phenomena that Dr. Blake and Dr. Kleinerman based their contrary opinions upon, and did not disclose any substantial basis for his contrary conclusion. Since there is no significant disparity of credentials, the weight of Dr. Blake's status as prosector and Dr. Kleinerman's corroborating conclusion is deemed to be determinative. Thus, entitlement under Part 718 is barred by the Claimant's failure to establish the existence of pneumoconiosis. Moreover, since the evidence of record, as previously analyzed does not establish total disability due to pneumoconiosis, entitlement is precluded by Claimant's failure to prove those elements also.

Entitlement

Having failed to prove the essential elements of entitlement under Part 727 or Part 718, Claimant cannot be awarded black lung benefits.

ORDER

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[42]The failure of proof related to coal mine employment, which would also apply to §718.303, and other presumptions dependent upon proof of length of coal mine employment has been discussed above in relation to Claimant's proof of the Miner's coal mine employment.

[43]Section 718.202(a)(1)(i) has no significant application to this claim because no board-certified or board-eligible radiologist read any x-ray as positive, and the first properly classified reading, which was by Dr. Duke, a board-certified radiologist in 1973, was negative for pneumoconiosis.

The claim of Dora Gracie Ivey on behalf of the deceased Miner, Earl Clayton Ivey, is denied..

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EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.